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Report
# of the Human Rights Committee

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Volume II

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VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 580/1994, Ashby v. Trinidad and Tobago (Views adopted on 21 March 2002, seventy-fourth session)*

Submitted by:	Interights (represented by Ms. Emma Playfair, Executive Director, and Ms. Natalia Schiffrin, Legal Officer, on behalf of and representing the author, acting as counsel)
Alleged victim:	Mr. Glenn Ashby
State party:	Trinidad and Tobago
Date of communication:	6 July 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2002,

Having concluded its consideration of Communication No. 580/1994, submitted to the Human Rights Committee by Interights, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Views under article 5, paragraph 4, of the Optional Protocol

1. The communication was submitted on 6 July 1994 by Interights on behalf of Glenn Ashby, a Trinidadian citizen, at the time of submission awaiting execution at the State prison at Port-of-Spain, Trinidad and Tobago. On 14 July 1994, after the complaint had been transmitted to the authorities of Trinidad and Tobago, Mr. Ashby was executed in the State prison. Counsel claims that Mr. Ashby was the victim of violations of articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 3 (b), (c), (d) and (g) and 5 of the International Covenant on Civil and Political Rights.[1]

The facts as submitted by counsel

2.1 Mr. Ashby was arrested on 17 June 1988. He was convicted of murder and sentenced to death in the Port-of-Spain Assizes Court on 20 July 1989. The Court of Appeal of Trinidad and Tobago dismissed his appeal on 20 January 1994. On 6 July 1994, the Judicial Committee of the Privy Council dismissed Mr. Ashby's subsequent application for special leave to appeal. With this, it was argued, all available domestic remedies within the meaning of the Optional Protocol had been exhausted. While Mr. Ashby might have retained the right to file a constitutional motion in the Supreme (Constitutional) Court of Trinidad and Tobago, it is submitted that the State party's inability or unwillingness to provide legal aid for constitutional motions would have rendered this remedy illusory.

2.2 The prosecution's case rested mainly on the testimony of one S. Williams, who had driven Mr. Ashby and one R. Blackman to the house where the crime was committed. This witness testified that before entering the victim's house with Blackman, Mr. Ashby had held a penknife in his hand. Furthermore, he testified that Mr. Ashby, after having left the house with Blackman and having entered the car, had said he had "cut the man with the knife". This testimony was corroborated by evidence of the pathologist, who concluded that the cause of death had been a stab wound to the neck. In addition to that, Mr. Ashby himself allegedly made oral as well as written statements admitting that he had killed the victim.

2.3 The defence challenged the credibility of the testimony of S. Williams and maintained that Mr. Ashby was innocent. It submitted that there was clear evidence that Mr. Williams was himself an accomplice to the crime; that Mr. Ashby had not carried a penknife; that it was Blackman who had sought to involve Mr. Ashby in the crime and that he had been beaten by a police officer after his arrest and had made a subsequent statement only after being promised that he could return home if he gave the statement.

The chronology of events surrounding Mr. Ashby's execution

3.1 Mr. Ashby's communication under the Optional Protocol was received by the secretariat of the Human Rights Committee on 7 July 1994. On 13 July 1994, counsel submitted additional clarifications. On the same day, the Committee's Special Rapporteur on New Communications issued a decision under rules 86 and 91 of the Committee's rules of procedure to the Trinidad and Tobago authorities, requesting a stay of execution, pending the determination of the case by the Committee, and seeking information and observations on the question of the admissibility of the complaint.

3.2 The combined rule 86/rule 91 request was handed to the Permanent Mission of Trinidad and Tobago at Geneva at 4.05 p.m. Geneva time (10.05 a.m. Trinidad and Tobago time) on 13 July 1994. According to the Permanent Mission of Trinidad and Tobago, this request was transmitted by facsimile to the authorities in Port-of-Spain between 4.30 and 4.45 p.m. on the same day (10.30-10.45 a.m. Trinidad and Tobago time).

3.3 Efforts continued throughout the night of 13 to 14 July 1994 to obtain a stay of execution for Mr. Ashby, both before the Court of Appeal of Trinidad and Tobago and before the Judicial Committee of the Privy Council in London. When the Judicial Committee issued a stay order shortly after 11.30 a.m. London time (6.30 a.m. Trinidad and Tobago time) on 14 July, it transpired that Mr. Ashby had already been executed. At the time of his execution, the Court of Appeal of Trinidad and Tobago was also in session, deliberating on the issue of a stay order.

3.4 On 26 July 1994, the Committee adopted a public decision expressing its indignation over the State party's failure to comply with the Committee's request under rule 86; it decided to continue consideration of Mr. Ashby's case under the Optional Protocol and strongly urged the State party to ensure, by all means at its disposal, that situations similar to that surrounding the execution of Mr. Ashby do not recur. The Committee's public decision was transmitted to the State party on 27 July 1994.

The complaint

4.1 Counsel claims a violation of articles 7, 10 and 14, paragraph 3 (g), alleging that Mr. Ashby was beaten and ill-treated at the police station after his arrest and that he signed the confession statement under duress, after having been told that he would be released if he signed the statement.

4.2 It is submitted that the State party violated article 14, paragraph 3 (d), since Mr. Ashby received inadequate legal representation prior to and during his trial. Counsel points out that Mr. Ashby's legal aid attorney spent hardly any time with his client to prepare the defence. The same lawyer reportedly argued the appeal without conviction.

4.3 Counsel submits that the failure of the Court of Appeal to correct the trial judge's omission to direct the jury on the danger of acting on uncorroborated evidence given by an accomplice, as well as the Privy Council's failure to correct the misdirection and material irregularities of the trial, amounted to a denial of Mr. Ashby's right to a fair trial.

4.4 In her initial submission, counsel submitted that Mr. Ashby was the victim of a violation of article 7 and 10, paragraph 1, on the grounds of his prolonged detention on death row, namely, for a period of 4 years, 11 months and 16 days. According to counsel, the length of the detention, during which Mr. Ashby lived in cramped conditions with no or very poor sanitary and recreational facilities, amounted to cruel, inhuman and degrading treatment within the meaning of article 7. As support for her argument, counsel adduces recent judgements of the Judicial Committee of the Privy Council and the Supreme Court of Zimbabwe.[2]

4.5 It is submitted that Mr. Ashby's execution violated his rights under the Covenant, because he was executed (1) after an assurance had been given to the Privy Council that he would not be executed before all his avenues of relief had been exhausted; (2) while his application for a stay of execution was still under consideration by the Court of Appeal in Trinidad and Tobago; and (3) just moments after the Privy Council heard and granted a stay. Moreover, Mr. Ashby was executed in violation of the Committee's rule 86 request.

4.6 Counsel further submits that Mr. Ashby's execution deprived him of his rights under:

(a) Article 14, paragraph 1, because he was denied a fair hearing in that he was executed before his pending litigation was completed; and

(b) Article 14, paragraph 5, because he was executed before the Court of Appeal in Trinidad and Tobago, the Privy Council and the Human Rights Committee reviewed his conviction and the lawfulness of his sentence. In this latter context, counsel recalls the Committee's jurisprudence that article 14, paragraph 5, applies to whatever levels of appeal are provided by law.[3]

4.7 Counsel concedes that there may be an issue of whether Mr. Ashby had a right, under article 14, paragraph 5, to have his case reviewed by a higher tribunal, where that constitutional review was available to him, and where he was already in the process of pursuing it and relying upon it. She submits that where an individual has been permitted to initiate a constitutional challenge, and where that individual is actually in court in the midst of seeking "review", that individual has a right under article 14, paragraph 5, to effective access to that review. Moreover, it is submitted that this interference with the appellate process was so grave that it not only violated the right to an appeal under article 14, paragraph 5, but also the right to a fair trial and equality before the courts under article 14, paragraph 1. It is clear that the constitutional process is governed by the guarantees of article 14, paragraph 1. Counsel relies on the Committee's Views in case No. 377/1989 (Currie v. Jamaica) in this respect.

4.8 It is submitted that article 6 has been violated both because it is a violation of article 6, paragraph 1, to execute the penalty of death in a case where the Covenant's other guarantees have not been adhered to, and because the specific guarantees of article 6, paragraphs 2 and 4, have not been adhered to. Finally, counsel argues that a "final judgement" within the meaning of article 6, paragraph 2, must be understood in this case to include the decision on the constitutional motion, because a final judgement on the constitutional motion, challenging the constitutionality of Mr. Ashby's execution, would in reality represent the "final" judgement of this case. Furthermore, article 6, paragraph 4, was violated because Mr. Ashby was in the process of pursuing his right to seek commutation when he was executed.

The State party's observations and counsel's comments thereon

5.1 In a submission dated 18 January 1995, the State party submits that its authorities "were not aware of the Special Rapporteur's request under rule 86 at the time of Mr. Ashby's execution. The representation of Trinidad and Tobago at Geneva transmitted a covering memorandum by fax at 16.34 (Geneva time) (10.34 Trinidad time) on 13 July 1994. This memorandum made reference to a note from the Centre for Human Rights. However, the note referred to was not attached to the memorandum. The entire application filed on behalf of Mr. Ashby, together with the Special Rapporteur's request under rule 86, was received by the Ministry of Foreign Affairs on 18 July 1994, that is, four days after Mr. Ashby's execution."

5.2 The State party notes that "unless the urgency of the request and Mr. Ashby's imminent execution were drawn by the Committee to the attention of the Permanent Representative, he would not in any way have been aware of the extreme urgency with which the request was to be transmitted to the relevant authorities in Trinidad and Tobago. It is not known whether the Committee in fact drew the urgency of the request to the attention of the Permanent Representative." Mr. Ashby was executed at 6.40 (Trinidad and Tobago time) on 14 July 1994.

5.3 The State party gives the following chronology of the events preceding Mr. Ashby's execution: "On 13 July 1994, a constitutional motion was filed on behalf of Mr. Ashby, challenging the constitutionality of the execution of the sentence of death upon him. Mr. Ashby's attorneys sought an order staying the execution until the determination of the motion. The High Court refused a stay of execution and held that Mr. Ashby had shown no arguable case to warrant the grant of a conservatory order. An appeal was filed on behalf of Mr. Ashby and another application was made to stay the execution pending the determination of the appeal. Attorneys for Mr. Ashby also sought to render ineffective the established procedure of the courts in Trinidad and Tobago by bypassing both the High Court and the Court of Appeal and approaching the Privy Council directly for a stay of execution, prior to the decisions of the local courts. There was confusion as to whether the State party's lawyer had given an undertaking to the Privy Council and as to whether the Privy Council had jurisdiction to grant a stay or a conservatory order prior to the decision of the local Court of Appeal."

5.4 The State party goes on to note that, so as "to preserve the status quo, the Privy Council granted a conservatory order in the event that the Court of Appeal refused a stay at 11.45 a.m. (United Kingdom time) (6.45 a.m. Trinidad and Tobago time) on 14 July 1994, that is five minutes after Mr. Ashby's execution. The trial attorney for Mr. Ashby indicated to the Court of Appeal at 6.52 (Trinidad and Tobago time) that he had received a document by fax from the Registrar of the Privy Council indicating that a conservatory order was granted in the event that the Court of Appeal refused a stay of execution. This order appeared to be conditional upon the Court of Appeal refusing to grant the stay of execution."

5.5 According to the State party, "Mr. Ashby was executed pursuant to a warrant of execution signed by the President, at a time when there was no judicial or presidential order staying the execution. The Advisory Committee on the Power of Pardon considered Mr. Ashby's case and did not recommend that he be pardoned."

5.6 The State party "questions the competence of the Committee to examine the communication, since the communication was submitted at a time when Mr. Ashby had not exhausted his domestic remedies, and the communication would therefore have been inadmissible under rule 90". It further disputes the Committee's finding, in its public decision of 26 July 1994, that it had failed to comply with its obligations both under the Optional Protocol and under the Covenant: "Apart from the fact that the relevant authorities were unaware of the request, the State party is of the view that rule 86 does not permit the Committee to make the request which was made nor does it impose an obligation on the State party to comply with the request."

6.1 In a submission dated 13 January 1995, counsel elaborates on the circumstances of the death of her client and submits new allegations relating to article 6 of the Covenant, as well as supplementary information on the claims initially filed under articles 7 and 14. She submits these observations at the express request of Desmond Ashby, the father of Glen Ashby, who has requested that the case of his son be further examined by the Committee.

6.2 Counsel provides the following chronology of events: "On 7 July 1994, through his attorneys in Trinidad and Tobago, Glen Ashby wrote to the Mercy Committee. Mr. Ashby requested the right to be heard before that body, stating that the Human Rights Committee was considering his communication and asking that the Mercy Committee await the outcome of the Human Rights Committee's recommendations. On 12 July 1994, the Mercy Committee rejected Glen Ashby's petition for mercy." On the same day, a warrant for execution at 6 a.m. on 14 July 1994 was read to Mr. Ashby.

6.3 On 13 July 1994, Mr. Ashby's lawyers in Trinidad filed a constitutional motion in the Trinidad and Tobago High Court, seeking a conservatory order staying the execution because of (1) delay in carrying out execution (pursuant to the Privy Council's judgement in Pratt and Morgan); (2) refusal of the Mercy Committee to consider the recommendations of the Human Rights Committee; (3) the unprecedented short interval between the reading of the warrant and the date of Mr. Ashby's execution. The respondents to the motion were the Attorney-General, the Commissioner of Prisons and the Prison Marshal. On 13 July, at approximately 3.30 p.m. London time, at a special sitting of the Privy Council, London counsel for Mr. Ashby sought a stay of execution on his behalf. The representative of the Attorney-General of Trinidad and Tobago then informed the Privy Council that Mr. Ashby would not be executed until all possibilities of obtaining a stay of execution, including applications to the Court of Appeal in Trinidad and Tobago and the Privy Council, had been exhausted. This was recorded in writing and signed by counsel for Mr. Ashby and counsel for the Attorney-General.

6.4 Also on 13 July, following a hearing in the High Court of Justice, Trinidad and Tobago, a stay of execution was refused. An appeal against the refusal was lodged immediately and its hearing started before the Court of Appeal in Trinidad and Tobago at 12.30 a.m. Trinidad and Tobago time, on the morning of 14 July. In the Court of Appeal, counsel for the respondents said that, notwithstanding any assurances given in the Privy Council, Glen Ashby would be hanged at 7 a.m. Trinidad and Tobago time (noon London time) unless the Court of Appeal granted a conservatory order. The Court of Appeal then proposed to adjourn until 11 a.m. Trinidad and Tobago time in order to seek clarification of what had taken place before the Privy Council. Lawyers for Mr. Ashby asked for a conservatory order until 11 a.m., noting that the execution had been scheduled for 7 a.m. and that counsel for the respondents had made it clear that Mr. Ashby could not rely on the assurance given to the Privy Council. The Court expressed the view that, in the interim, Mr. Ashby could rely on the assurance given to the Privy Council, and declined to make a conservatory order. The Court instead decided to adjourn until 6 a.m. Lawyers for Mr. Ashby applied for an interim conservatory order until 6 a.m. but the Court denied this request. At no time did the lawyers for the State party indicate that the execution was scheduled to take place earlier than 7 a.m.

6.5 On 14 July, at 10.30 a.m. London time, at a special sitting of the Judicial Committee of the Privy Council, a document was signed by counsel for the Attorney-General of Trinidad and Tobago in London and countersigned by counsel for Mr. Ashby, recording what had happened, and what had been said in the Privy Council on 13 July. That document, consisting of three handwritten pages, was immediately sent by the Registrar of the Privy Council by facsimile to the Court of Appeal and to counsel for both sides in Trinidad and Tobago. Mr. Ashby's lawyers in Trinidad and Tobago received the document before 6 a.m. The Privy Council then asked for further clarification of the Attorney-General's position. As no clarifications were forthcoming, the Privy Council ordered a stay of execution at approximately 11.30 a.m. London time, directing that the sentence of death should not be carried out. At approximately the same time, 6.20 a.m. in Trinidad and Tobago, the Court of Appeal reconvened. At this time, lawyers for Mr. Ashby informed the Court that, at that moment, the Privy Council was in session in London. Counsel for Mr. Ashby also gave the Court the three-page document received by fax.

6.6 At around 6.40 a.m., the lawyers for Mr. Ashby again applied to the Court of Appeal in Trinidad and Tobago for a conservatory order. The order was denied; the Court again emphasizing that Mr. Ashby could rely on the assurance given to the Privy Council. At this point, one of Mr. Ashby's lawyers appeared in Court with a handwritten transcript of an order of the Privy Council staying the execution. The order had been read to him over the telephone, having been granted at approximately 6.30 a.m. Trinidad and Tobago time (11.30 a.m. London time). Shortly thereafter, it was announced that Mr. Ashby had been hanged at 6.40 a.m.

Decision on admissibility

7.1 At its fifty-fourth session in July 1995, the Committee considered the admissibility of the communication.

7.2 As to the claims under article 14, paragraph 1, relating to the trial judge's alleged failure to direct the jury properly on the danger inherent in relying on the testimony of a potential accomplice to the crime, the Committee recalled that it is primarily for the courts of States parties to the Covenant, and not for the Committee, to review facts and evidence in a particular case. It is for the appellate courts of States parties to the Covenant to review the conduct of the trial and the judge's instructions to the jury, unless it can be ascertained that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The trial transcript in Mr. Ashby's case did not reveal that his trial before the Assizes Court of Port-of-Spain suffered from such defects. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7.3 As to the claims related to Mr. Ashby's ill-treatment after his arrest, the inadequate preparation of his defence, the inadequacy of his legal representation, the alleged involuntary nature of his confession, the undue delay in the adjudication of his appeal, and the conditions of his detention, the Committee considered them to have been sufficiently substantiated, for purposes of admissibility. These claims, which may raise issues under articles 7, 10, paragraph 1, and 14, paragraphs 3 (b), (c), (d) and (g) and 5, should accordingly be considered on their merits.

7.4 As to the claims under article 6, the Committee has noted the State party's contention that since the communication was submitted at a time when Mr. Ashby had not exhausted available domestic remedies, his complaint should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. Counsel has argued that, as Mr. Ashby was executed unlawfully while he was pursuing judicial remedies, the State party is estopped from claiming that further remedies remained to be exhausted.

7.5 The Committee observed that it was to prevent "irreparable harm" to Mr. Ashby that the Committee's Special Rapporteur issued, on 13 July 1994, a request for a stay of execution pursuant to rule 86 of the rules of procedure; this request was intended to allow Mr. Ashby to complete pending judicial remedies and to enable the Committee to determine the question of the admissibility of Mr. Ashby's communication. In the circumstances of the case, the Committee concluded that it was not precluded, by article 5, paragraph 2 (b) of the Optional Protocol, from considering Mr. Ashby's complaint under article 6, and that it was not necessary for counsel first to exhaust available local remedies in respect of her claim that Mr. Ashby was arbitrarily deprived of his life before she could submit this claim to the Committee.

8. On 14 July 1995, the Human Rights Committee therefore decided that the communication was admissible inasmuch as it appeared to raise issues under articles 6, 7, 10, paragraph 1, and 14, paragraphs 3 (b), (c), (d) and (g) and 5, of the Covenant.

State party's observations on the merits and counsel's comments thereon

9.1 By submission of 3 June 1996, the State party submits explanations and statements with regard to the merits of the case.

9.2 With regard to the alleged ill-treatment of Mr. Ashby after his arrest, the State party refers to the trial transcript. The State party submits that these allegations were raised in relation to Mr. Ashby's confession and that Mr. Ashby had the opportunity to give evidence and was cross-examined on this issue. The court therefore dealt with the complaint impartially and these findings of the court should prevail.

9.3 With regard to the inadequate preparation of Mr. Ashby's defence, the State party submits that the legal aid attorney, who appeared for him, is a well-known and competent counsel, who practises at the Criminal Bar in Trinidad and Tobago. The State party attaches comments by the former trial attorney refuting Mr. Ashby's allegations to the submission.

9.4 The State party further reiterates that a fair hearing took place with regard to the involuntary confession. Both the court of appeal and the State Court of Trinidad and Tobago were aware of the complaint in respect to the confession and reviewed the facts and evidence in an impartial manner.

9.5 On the question of undue delay in adjudication of Mr. Ashby's appeal, the State party points to the circumstances prevailing in Trinidad and Tobago at that time. The State party argues that delays are caused by the practice in all murder trials of handwritten notes of evidence that would then need to be typed and verified by the respective trial judge on top of their busy court schedule. Furthermore, it has proven difficult to recruit lawyers suitable for filling vacancies in the judiciary, so that even the Constitution had to be changed to allow the appointment of retired judges. Still, there are not enough judges at the High Court to deal with the increasing number of appeals in criminal cases. The State party explains that from January 1994 to April 1995, after the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan, the High Court almost exclusively heard appeals in murder cases, largely ignoring civil appeals.

9.6 The State party submits that the conditions of Mr. Ashby's detention are similar to those of all prisoners on death row. The State party points to an affidavit of the Commissioner of Prisons attached to the submission and describing the general conditions of prisoners on death row. The State party contends that the facts in Pratt and Morgan and the Zimbabwe judgement are so different from the facts in Mr. Ashby's case that statements in these provide little, if any, assistance.

9.7 With regard to the alleged violation of article 6 of the Covenant, the State party submits that the Committee should not proceed with this claim as proceedings were filed at the High Court of Trinidad and Tobago in relation to the execution of Mr. Ashby. Without prejudice to this submission, the State party argues that Mr. Ashby had no right to be heard by the Mercy Committee pointing to precedence decision of the Judicial Committee of the Privy Council.[4]

9.8 The State party contests details of the facts as provided by counsel. In particular, the State party states that it was not correct that the Court of Appeals expressed the view that counsel should rely on the assurances given to the Privy Council that Mr. Ashby would not be executed. Instead, the Court expressed that it was not prepared to do anything until the Judicial Committee of the Privy Council resolved the dispute.

9.9 On 26 July 1996, counsel requested the Committee to suspend examination of the merits of the communication, as an effective domestic remedy could be regarded as having become available. Counsel submits that the father of Mr. Ashby brought a constitutional and civil action against the State party in relation to the circumstances of the execution. On 16 July 2001, counsel requested the Committee to resume consideration of the case and submitted that the lawyers in Trinidad and Tobago had been unable to resolve difficulties in meeting certain procedural requirements with regard to the constitutional and civil action.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee notes the State party's statement that Mr. Ashby's lawyers in Trinidad and Tobago were pursuing, on behalf of his estate and his father, certain court actions in relation to the circumstances surrounding Mr. Ashby's execution. The Committee notes that the civil and constitutional procedures in question are not relevant for the consideration of the claims in the present case. However, the Committee respected counsel's request to suspend examination of the merits (see paragraph 9.9).

10.3 With regard to the alleged beatings and the circumstances leading to the signing of the confession, the Committee notes that Mr. Ashby did not give precise details of the incidents, identifying those he holds responsible. However, details of his allegations appear from the trial transcript submitted by the State party. The Committee observes that the allegations of Mr. Ashby were dealt with by the domestic court and that he had the opportunity to give evidence and was cross-examined. His allegations were also mentioned in the decision of the Court of Appeals. The Committee recalls that it is in general for the courts of States parties, and not for the Committee, to evaluate the facts in a particular case. The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts were manifestly arbitrary or amounted to a denial of justice.[5] The Committee finds that there is not sufficient evidence to sustain a finding that the State party violated its obligations under article 7 of the Covenant.

10.4 With regard to the claim of inadequacy of legal representation during and in preparation of the trial and the appeals proceedings, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[6] In the instant case, there is no reason for the Committee to believe that the trial attorney was not using other than his best judgement. It is apparent from the trial transcript that the lawyer cross-examined all witnesses. It is further apparent from the appeals decision that the grounds of appeal submitted by the lawyer were argued and fully taken into account by the High Court in its reasoning. The material before the Committee does not reveal that either counsel or the author ever complained to the trial judge that the time for preparation of the defence was inadequate. In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

10.5 Counsel also claims undue delay in the adjudication of Mr. Ashby's appeal. The Committee notes that the Port-of-Spain Assize Court found Mr. Ashby guilty of murder and sentenced him to death on 20 July 1989 and that the Court of Appeals affirmed the sentence on 20 January 1994. Mr. Ashby remained in detention during this time. The Committee notes the State party's explanation concerning the delay in the appeals proceedings against Mr. Ashby. The Committee finds that the State party did not submit that the delay in proceedings was dependent on any action by the accused nor was the non-fulfilment of this responsibility excused by the complexity of the case. Inadequate staffing or general administrative backlog is not sufficient justification in this regard.[7] In the absence of any satisfactory explanation from the State party, the Committee considers that the delay of some four and a half years was not compatible with the requirements of article 14, paragraphs 3 (c) and 5, of the Covenant.

10.6 As to the conditions of Mr. Ashby's detention (see paragraph 4.4), the Committee reaffirms its constant jurisprudence that detention on death row for a specific period does not violate, as such, article 7 of the Covenant in the absence of further compelling circumstances. The Committee concludes that article 7 has not been violated in the instant case.

10.7 As to the claim regarding Mr. Ashby's conditions of detention being in violation of article 10 of the Covenant, the Committee notes the absence of any further submission after the Committee's admissibility decision in substantiation of Mr. Ashby's claim. Therefore, the Committee is unable to find a violation of article 10 of the Covenant.

10.8 Counsel finally submits that Mr. Ashby was arbitrarily deprived of his life when the State party executed him in full knowledge of the fact that Mr. Ashby was still seeking remedies before the Courts of Appeal of the State party, the Judicial Committee of the Privy Council and the Human Rights Committee. The Committee finds that, in these circumstances (detailed above at 6.3 to 6.6), the State party committed a breach of its obligations under the Covenant. Moreover, having regard to the fact that the representative of the Attorney-General informed the Privy Council that Mr. Ashby would not be executed until all possibilities of obtaining a stay of execution had been exhausted, the carrying out of Mr. Ashby's sentence notwithstanding that assurance constituted a breach of the principle of good faith which governs all States in their discharge of obligations under international treaties, including the Covenant. The carrying out of the execution of Mr. Ashby when the execution of the sentence was still under challenge constituted a violation of article 6, paragraphs 1 and 2, of the Covenant.

10.9 With regard to Mr. Ashby's execution, the Committee recalls its jurisprudence that apart from any violation of the rights under the Covenant, the State party commits a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile.[8] The behaviour of the State party represents a shocking failure to demonstrate even the most elementary good faith required of a State party to the Covenant and of the Optional Protocol.

10.10 The Committee finds that the State party breached its obligations under the Protocol, by proceeding to execute Mr. Ashby before the Committee could conclude its examination of the communication, and the formulation of its Views. It was particularly inexcusable for the State to do so after the Committee had acted under its rule 86 requesting the State party to refrain from doing so. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim, undermines the protection of Covenant rights through the Optional Protocol.

11. The Human Rights Committee, acting under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 6, paragraphs 1 and 2 and 14, paragraphs 3 (c) and 5, of the Covenant.

12. Under article 2, paragraph 3, of the Covenant, Mr. Ashby would have been entitled to an effective remedy including, first and foremost, the preservation of his life. Adequate compensation must be granted to his surviving family.

13. On becoming a State party to the Optional Protocol, Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000;[9] in accordance with article 12 (2) of the

Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Initially, the Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Trinidad and Tobago on 14 February 1981. On 26 May 1998, the Government of Trinidad and Tobago denounced the Optional Protocol. On the same day, it re-acceded, including in its instrument of re-accession a reservation "to the effect that the Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith". On 27 March 2000, the Government of Trinidad and Tobago denounced the Optional Protocol again.

[2] Judicial Committee of the Privy Council, Pratt and Morgan v. Attorney-General of Jamaica, Privy Council Appeal No. 10/1993, judgement of 2 November 1993; Supreme Court of Zimbabwe, judgement No. SC 73/93 of 24 June 1993 (unreported).

[3] Communication No. 230/1987, Henry v. Jamaica, para 8.4; Views adopted on 1 November 1991.

[4] De Freitas v. Benny (1975), 3 WLR 388; Reckley v. Minister of Public Safety (No. 2) (1996), 2 WLR 281 at 291G to 292G.

[5] Terrence Sahadeo v. Guyana, Case No. 728/1996, Views adopted on 1 November 2001, para. 9.3.

[6] See, inter alia, the Committee's decision in Communication No. 536/1993, Perera v. Australia, declared inadmissible on 28 March 1995.

[7] Communication No. 390/1990, Lubuto v. Zambia, para. 7.3.

[8] See Communication No. 707/1996, Patrick Taylor v. Jamaica, para. 8.5.

[9] Communications Nos. 839/1998, 840/1998, and 841/1998, Mansaraj et al. v. Sierra Leone, Gborie et al. v. Sierra Leone and Sesay et al. v. Sierra Leone, para. 5.1 et seq.; Communication No. 869/1999, Piandiong et al. v. The Philippines, para. 5.1 et seq.

B. Communication No. 641/1995, Gedumbe v. Democratic Republic of the Congo (Views adopted on 9 July 2002, seventy-fifth session)*

Submitted by:	Nyekuma Kopita Toro Gedumbe
Alleged victim:	The author
State party:	Democratic Republic of the Congo
Date of decision on admissibility:	1 August 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 July 2002,

Having concluded its consideration of Communication No. 641/1995 submitted by Mr. Nyekuma Kopita Toro Gedumbe under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Nyekuma Kopita Toro Gedumbe, a citizen of the Democratic Republic of the Congo (ex-Zaire) residing in Bujumbura, Burundi. He claims to be a victim of a violation by the Democratic Republic of the Congo (ex-Zaire) of articles 2, paragraphs 1 and 3; 7; 14; 17; 23, paragraph 1; 25 (a) and (c); and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as presented by the author

2.1 In 1985 the author was appointed director of a Zairian consular school in Bujumbura, Burundi. In 1988 he was suspended from his duties by Mboloko Ikolo, the then Zairian ambassador to Burundi. This suspension allegedly was attributable to a complaint addressed by the author and by other staff members of the school[8] to several administrative authorities of Zaire, including the President and the Minister of Foreign Affairs, concerning the embezzlement by Mr. Ikolo of the salaries for the personnel of the consular school. More particularly, the ambassador allegedly embezzled the author's salary in order to force him to yield his wife.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.2 In March 1988 a fact-finding commission was sent from Zaire to Bujumbura, which, purportedly, made an overwhelming report against the ambassador and confirmed all the allegations made against him. In August 1988 the Minister of Foreign Affairs of Zaire enjoined Mr. Ikolo to pay all the salary arrears to the author, who, in the meantime, had been transferred as director of the Zairian consular school to Kigali, Rwanda. The ambassador, who allegedly refused to obey this order, was suspended from his duties and recalled to Zaire on 20 June 1989.

2.3 In September 1989 the Ministry of Primary and Secondary Education issued an order to reinstate the author in his post in Bujumbura. Accordingly, the author moved back to Burundi in order to fill his post. Subsequently, Mr. Ikolo, who despite his suspension remained in Bujumbura until 20 December 1989, informed the authorities in Zaire that the author was a member of a network of political opponents of the Zairian Government, and that he therefore had requested the authorities of Burundi to expel him. For this reason, the author maintains, Mr. Ikolo and his successor at the embassy, Vizi Topi, refused to reinstate him in his post, even after confirmation by the Minister of Primary and Secondary Education, or to pay his salary arrears.

2.4 The author appealed to the Public Prosecutor of the County Court (Tribunal de Grande Instance) of Uvira, who passed on the file to the Public Prosecutor of the Court of Appeal (Cour d'Appel) of Bukavu on 25 July 1990. Both offices described the facts as being an abuse of rights and called into question the former ambassador's conduct. On 14 September 1990 the case was further transmitted for advice to the Office of the Public Prosecutor in Kinshasa, where the case was registered in February 1991. Since then, despite numerous reminders sent by the author, no further action has been taken. Consequently, the author appealed to the Minister of Justice and to the Chairman of the National Assembly. The latter interceded with the Minister of Foreign Affairs and the Minister of Education, who, allegedly, intervened on the author's behalf with Mr. Vizi Topi, all to no avail.

2.5 On 7 October 1990 the author served a summons on Mr. Ikolo for adultery, slanderous denunciation and prejudicial charges, abuse of power and embezzlement of private monies. By a letter dated 24 October 1990, the President of the Kinshasa Court of Appeal (Cour d'Appel) informed the author that Mr. Ikolo, as an ambassador, benefited from functional immunity and could only be brought to trial upon summons of the Public Prosecutor. All the author's requests to the latter to start legal proceedings against Mr. Ikolo have to date remained unanswered. According to the author, this is due to the fact that a special authorization of the President is required to start legal proceedings against members of the security police and that, therefore, the Public Prosecutor could not take the risk of serving a summons on Mr. Ikolo, who is also a senior official in the National Intelligence and Protection Service. Accordingly, the author's case cannot be the subject of a judicial determination. Therefore, it is submitted, all available and effective domestic remedies have been exhausted.

The complaint

3.1 The author argues that the arbitrary deprivation of his employment, the embezzlement of his salary and the destabilization of his family amounts to torture and to cruel and inhuman treatment. The author further contends that the Government, represented by the Public Prosecutor, denies him the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

3.2 The author further argues that his family has been destabilized by the immoral behaviour of the ambassador, who allegedly had adulterous relations with the author's wife, in violation of article 17. It is further alleged that, due to the difficult life the author and his family have led since he was suspended from his duties, the author's family does not enjoy the protection to which it is entitled, in breach of article 23, paragraph 1.

3.3 The author claims that, as a director of a public school being prevented from exercising his duties, his rights under article 25 (a) and (c) have been violated. The author finally contends that he is the victim of a violation of article 26, since he was suspended from public service without disciplinary sanctions having been imposed on him, and thus in breach of the law. In this connection, the author claims that the failure of the Government to compel the ambassador to allow him to exercise his duties, even after official reinstatement in his post, constitutes a violation of article 2, paragraphs 2 and 3.

3.4 The author indicates that the matter has not been submitted to any other procedure of international investigation or settlement.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 At its sixtieth session in July-August 1997, the Committee considered the admissibility of the communication.

4.3 The Committee considered that the author's claim that the facts as described by him constituted a violation of articles 7, 17, 23 and 25 (a) has been unsubstantiated for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.4 The Committee also considered that, in the absence of any information provided by the State party, the author's claims that he has been denied access to public service, as well as equality before the law and the courts because the State party failed to enforce its decisions to pay back the author's salary and to reinstate him and because he is being prevented from bringing his complaint before the courts may raise issues under articles 14, paragraph 1, 25 (c) and 26 of the Covenant, which need to be examined on the merits. On 1 August 1997 the Committee declared this part of the communication admissible.

On the merits

5.1 The Committee has examined the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol. The Committee notes that, while it has received sufficient information from the author, the State party, despite reminders addressed to it, has not responded in respect of admissibility or the merits of the communication. The Committee recalls that under article 4, paragraph 2, of the Optional Protocol, a State party is bound to cooperate by submitting to it written explanations in clarification and by indicating, where appropriate, the measures taken to remedy the situation. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2 With regard to the alleged violation of article 25 (c) of the Covenant, the Committee notes that the author has made specific allegations relating, on the one hand, to his suspension in complete disregard of legal procedure and, in particular, in violation of the Zairian regulations governing State employees, and, on the other hand, to the failure to reinstate him in his post, in contravention of decisions by the Ministry of Primary and Secondary Education. In this connection the Committee notes also that the non-payment of the author's salary arrears, notwithstanding the instructions by the Minister for Foreign Affairs, is the direct consequence of the failure to implement the above-mentioned decisions by the authorities. In the absence of a response by the State party, the Committee finds that the facts in the case show that the decisions by the authorities in the author's favour have not been acted upon and cannot be regarded as an effective remedy for violation of article 25 (c) read in conjunction with article 2 of the Covenant.

5.3 To the extent that the Committee has found that there was no effective legal procedure allowing the author to invoke his rights before a tribunal (article 25 (c) in conjunction with article 2), no separate issue arises concerning the conformity of proceedings before such a tribunal with article 14 of the Covenant. With regard to article 26, the Committee sustains the author's reasoning by finding a violation of article 25 (c).

6.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations by the Democratic Republic of the Congo of articles 25 (c) in conjunction with article 2 of the Covenant.

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to public service and to his post, with all the consequences that that implies, or, if necessary, to a similar post;[2] (b) compensation comprising a sum equivalent to the payment of the arrears of salary and remuneration that he would have received from the time at which he was not reinstated to his post, beginning in September 1989.[3]

6.3 The Committee recalls that, by becoming a party to the Optional Protocol, the Democratic Republic of the Congo has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Thus, the Committee wishes to receive from the State party, within 90 days of the transmission of these Views, information about the measures taken to give effect hereto. The State party is also requested to give publicity to the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] This complaint was also signed by Odia Amisi; Communication No. 497/1992 (Odia Amisi v. Zaire) was declared inadmissible on 27 July 1994.

[2] Communication No. 630/1995 Abdoulaye Mazou v. Cameroon.

[3] Communications Nos. 422/1990, 423/1990 and 424/1990, Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo.

C. Communication No. 667/1995, Ricketts v. Jamaica (Views adopted on 4 April 2002, seventy-fourth session)*

Submitted by:	Mr. Hensley Ricketts (represented by Simons Muirhead and Burton, a London law firm
Alleged victim:	The author
State party:	Jamaica
Date of communication:	4 April 1995 (initial submission)
Decision on admissibility:	30 April 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 2002,

Having concluded its consideration of Communication No. 667/1995, submitted to the Human Rights Committee by Mr. Hensley Ricketts under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Hensley Ricketts, a Jamaican citizen, at the time of submission detained at South Camp Rehabilitation Centre, in Kingston, Jamaica. He claims to be a victim of violations by Jamaica[1] of articles 6 (1) and (2) and 14 (1), (2) and (3) (b) and (d) of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden

The texts of a dissenting opinion co-signed by Committee members Ms. Cecilia Medina Quiroga and Mr. Martin Scheinin and a dissenting opinion by Mr. Hipólito Solari Yrigoyen are appended to the present document.

Facts as submitted by the author

2.1 The author was convicted for the murder, on 9 March 1983, of one Clinton Campbell and sentenced to death on 31 October 1983 by the Lucea Circuit Court, Hanover. He applied for leave to appeal against conviction and sentence. The Court of Appeal of Jamaica dismissed his application on 20 December 1984. In spite of the preparation of a draft constitutional motion in June 1986, and several requests from London counsel to the Jamaican lawyer Mr. Daly until March 1994, the constitutional motion was never filed. However, in 1994, the author filed a petition for special leave to appeal to the Judicial Committee of the Privy Council; his petition was dismissed on 15 January 1995. With this, it is submitted, all domestic remedies have been exhausted. In January 1993, the offence for which the author was convicted was classified as a non-capital offence under the Offences against the Person (Amendment) Act 1992, and his sentence was converted to life imprisonment.

2.2 At the trial, a Mr. McKenzie gave evidence to the effect that he saw the author, whom he knew, join a group of three people, Mr. Campbell and two other men, in the night of 9 March 1983. A fight broke out between the author and Mr. Campbell, then Mr. Campbell ran to his house, followed by the other three men. Mr. McKenzie then heard "bawling" and he went to Mr. Campbell's house and saw Mr. Campbell's mother call a car to take Mr. Campbell to the hospital. Mr. McKenzie made a statement to DC Blake, a station officer, about what he had seen. Mrs. Campbell gave evidence that her son came into the house wounded and collapsed onto the floor, and that she called a car. Dr. Carlton Jones, who performed the post-mortem examination on the body of Mr. Campbell, testified that the victim must have died within half an hour after he had been wounded by a sharp instrument. The arresting officer, DC Blake, gave evidence to the effect that upon his arrest the author admitted to having assaulted Mr. Campbell. The author made an unsworn statement, saying he and the deceased had an argument about drugs and that Mr. Campbell started beating him with a machete. The author fled to the police station, where he was told to come back next day. When he returned to the police station, he was charged with murder by DC Blake. He denied having killed Mr. Campbell.

2.3 On 31 October 1983 the author was convicted of murder and sentenced to death by the Lucea Circuit Court. Although the verdict of the jury had to be unanimous, the author claims that 4 of the 12 jurors disagreed with the foreman and that the foreman falsely told the Court that the jury was unanimous. On 1 November 1983 four affidavits were presented, which state that they disagreed with the verdict.

The complaint

3.1 The author claims to be a victim of a violation of articles 14 (1) and (2) of the Covenant. Pursuant to section 44 (1) of the Jamaican Jury Law "unanimous verdict of the jury shall be necessary for the conviction or acquittal of any person for murder". The author maintains that contrary to this rule, the jury at the Lucea Circuit Court was not unanimous. However, the foreman of the jury said that they had arrived at a unanimous verdict, and that the jury had found the author guilty. The Jamaican trial lawyer, Mr. Eric Frater received on the day following conviction, 1 November 1983, affidavits, from four of the jurors stating that they had not found the author guilty, and that two of them had protested in Court against the foreman's declaration by shaking their heads, and one by crying, while the foreman read out the verdict. The author was therefore found guilty upon a verdict agreed by only 8 out of 12 jurors. Counsel argues that the Court failed to direct the jury that their verdict had to be unanimous, and that its failure to acknowledge the visible dissent of the jury denied the author's right to be presumed innocent until proved guilty. In the Court of Appeal, the author was represented by a new counsel, Ms. J. Nosworthy, appointed by Court, whereas before he had been represented by a privately retained lawyer. The unanimity of the jury was not raised because Ms. J. Nosworthy was not aware of this issue.

3.2 Furthermore, the author claims to be a victim of a violation of articles 14 (3) (b) and (d) of the Covenant. The author's right to a defence was not respected, in that the legal aid lawyer, who represented him before the Jamaican Court of Appeal never met him before the hearing, never contacted the former lawyer and therefore, did not provide the author with effective and adequate representation.

3.3 The author also claims to be a victim of a violation of article 6 (1) and (2) of the Covenant. In this context, he notes that the author spent more than nine years on death row, before his sentence was re-classified. It is submitted that had the sentence been carried out, this would have led to arbitrary deprivation of life as a result of the circumstances surrounding the return of the jury's verdict at his trial for murder. Moreover, the author's right to life was not protected by the law throughout this entire period.

3.4 London Counsel explains that, when he was seized of the author's case in January 1986, he tried to have a constitutional motion filed on the author's behalf through Jamaican counsel Mr. Daly. However, despite repeated requests from counsel until March 1994, the constitutional motion was never filed. It is therefore argued that the constitutional remedy, which exists in theory, is not available to the author in practice, because of his lack of funds and the unavailability of legal aid. Reference is made to the Committee's jurisprudence in this matter.

3.5 It is stated that the same matter has not been submitted to another procedure of international investigation or settlement.

The State party's submission

4.1 By submission of 11 January 1996, the State party rejects the allegation that article 6 (1) and (2) was breached in the author's case because of the 9 years he spent on death row before the commutation of his sentence to life imprisonment with the recommendation that he serve 15 years before being eligible for parole.

4.2 With regard to the alleged breach of article 14 (1) and (2) of the Covenant, because four jury members disagreed with the verdict, the State party noted that "the four jurors in question gave sworn affidavits stating that they objected to the decision to the author's defence counsel on the day the trial ended, 30 November 1983. The Ministry considers these allegations to be of an extremely serious nature, warranting thorough investigation. The matter will be investigated and the Committee informed on the result".

4.3 With regard to the alleged violation of article 14 (3) (b) and (d), because the author's legal counsel on appeal did not argue the lack of unanimity of the jury as a ground of appeal, the State party rejects responsibility. It states that its duty is to provide competent counsel but that it is not responsible for the handling of the case by counsel.

The author's comments

5.1 In his comments dated 13 February 1996, the petitioner argues that the execution of the death sentence against the author would have constituted an arbitrary deprivation of life as a result of the circumstances surrounding the jury's verdict. The author agrees with the State party that the lack of unanimity of the jury is a serious matter warranting thorough investigation.

5.2 With regard to the author's representation on appeal, counsel argues that effective representation should be provided in all capital cases. Since the State party has a duty to provide competent counsel it must mean that the State party is responsible for the manner in which counsel conducts the case to ensure that it constitutes effective representation.

Decision on admissibility

6. At its sixty-fifth session in March 1999, the Committee declared the communication admissible insofar as it may raise issues under articles 6 and 14 of the Covenant. The Committee also decided that the State party should be requested, under article 4 (2) of the Optional Protocol, to submit to the Committee, within six months of the date of transmittal to it of the decision, written explanations or statements clarifying the matter and the measures, if any, that it may have taken. In particular, the State party was requested to provide the Committee with the outcome of its investigations and to furnish a copy of the original grounds of appeal filed on behalf of the author.

Issues and proceedings before the Committee

7.1 The Human Rights Committee has considered this communication in the light of all the written information submitted to it by the parties, in accordance with the provisions of article 5 (1) of the Optional Protocol. The Committee regrets the absence of cooperation of the State party in failing to provide the results of the investigations referred to in its submission of January 1996 (para. 4.2). In spite of two reminders sent to the State party, no further information has been received by the Committee.

7.2 With regard to the author's claim that he is a victim of a violation of articles 14 (1) and (2) of the Covenant, because he was convicted and sentenced by a non-unanimous jury, the Committee notes that after the trial four members of the Lucea Circuit Court jury submitted affidavits stating that they had not agreed to the verdict, though they conceded that they had not given oral expression to their differing view when the jury foreman announced that the verdict was accepted by all jurors. The Committee observes that the question presented by the jurors' affidavits was raised on appeal before the Judicial Committee of the Privy Council, which dismissed the petition. The Committee further notes that the alleged lack of unanimity was not raised before the trial judge nor before the Court of Appeal. In these circumstances, the Committee cannot conclude that article 14, paragraphs 1 and 2 of the Covenant has been violated.

7.3 In respect of the author's claim that he was not adequately represented during the hearing of his appeal, the Committee notes that the legal aid lawyer who represented the author for his appeal, did not contact the author or the privately retained lawyer who represented him at the first instance court, before the hearing of the appeal. Nevertheless, although it is incumbent on the State party to provide effective legal aid representation, it is not for the Committee to determine how this should have been ensured, unless it is apparent that there has been a miscarriage of justice. In the circumstances, the Committee is not able to find a violation of article 14 (3) (b) and (d).

7.4 The Committee therefore considers that there is also no violation of article 6 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The Optional Protocol entered into force for Jamaica on 23 March 1976, and Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998.

APPENDIX

Individual opinion of Committee members Ms. Cecilia Medina Quiroga and Mr. Martin Scheinin (dissenting)

In our view the Committee should have found a violation of article 14, paragraph 1, and, consequently, of article 6 in the case. In its only submission to the Committee the State party has described the author's allegation of the jury having been in fact and visibly divided (see paragraph 3.1) as "extremely serious" and promised a "thorough investigation". No further information has been received from the State party.

Due to the circumstances reflected in paragraph 3.2 and the fact that the Judicial Committee of the Privy Council did not give any reasons for its decision to dismiss the author's appeal, there is no material before the Committee that would show that the question whether there was "visible dissent" within the jury was ever addressed by a judicial body, nor any information on whether the problem could have been posed before another body.

In the absence of any explanations from the State party, particularly after its promise to investigate the matter and inform the Committee, the Committee must give due weight to the allegations of the author.

(Signed) Cecilia Medina Quiroga

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I disagree with regard to the present communication on the grounds set forth below.

With regard to the author's claim that he is a victim of a violation of article 14, paragraphs 1 and 2, of the Covenant, the Committee, given the absence of information from the State party, must give due weight to the author's statements, which are corroborated by other evidence. The Committee notes with concern that the day after the foreman of the jury presented the verdict as a unanimous verdict, four members of the jury submitted affidavits stating that they had dissented, and two of them gave convincing evidence in public of their dissenting view at the time the verdict was announced. In addition, the Committee has not received the results of the investigation that the State party indicated that it would conduct in view of the seriousness of the subject matter of the affidavits of the dissenting members, as application of the death penalty requires a unanimous decision. Accordingly, the Committee finds that article 14, paragraphs 1 and 2, of the Covenant has been violated.

In respect of the author's claim that he was not adequately represented during the hearing of his appeal, the Committee notes with concern that the legal aid lawyer that represented the author for his appeal did not contact the author; neither did the privately retained lawyer that represented him in the first instance court, before the hearing of the appeal. This effectively prevented the author from giving his lawyer essential information and instructions for the appeal, in particular concerning the dissent among the jury. Communication between counsel and defendant is one of the minimum guarantees under article 14, paragraphs 1 and 3, of the Covenant.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

D. Communication No. 677/1996, Teesdale v. Trinidad and Tobago (Views adopted on 1 April 2002, seventy-fourth session)*

Submitted by:	Mr. Kenneth Teesdale (represented by Nabarro Nathanso a law firm in London)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	16 March 1995 (initial submission)
Decision on admissibility:	23 October 1998

The Human Rights Committee, established under article 28 of the International Covena on Civil and Political Rights,

Meeting on 1 April 2002,

Having concluded its consideration of Communication No. 677/1996, submitted to the Human Rights Committee by Mr. Kenneth Teesdale under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Kenneth Teesdale, a Trinidadian citizen currently detained at State Prison in Port-of-Spain, Trinidad and Tobago. He claims to be the victim of violations by Trinidad and Tobago of articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by Nabarro Nathanson, a law firm ir London.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

The texts of individual opinions signed by Committee members Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Ivan Shearer and Mr. Hipólito Solari Yrigoyen are appended to the present document.

Facts as presented by the author

2.1 On 28 May 1988, the author was detained by the police and taken to hospital. On 31 May 1988 he was discharged from the hospital and on 2 June 1988 he was formally charged with the murder of his cousin "Lucky" Teesdale on 27 May 1988. After a trial, which started on 6 October 1989, the author was convicted and sentenced to death on 2 November 1989 by the San Fernando Assizes Court. He applied for leave to appeal against conviction and sentence. The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 22 March 1994, with reasons given on 26 October 1994. On 13 March 1995, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal. On 8 March 1996, a warrant for execution on 13 March was read out to the author. On 11 March, the author filed a constitutional motion to the High Court against the execution; the High Court granted a stay of execution. The Attorney-General withdrew the case from the High Court and presented it before the Advisory Committee on the Power of Pardon. On 26 June, the author was informed that the President had commuted his death sentence to 75 years' imprisonment with hard labour. It is submitted that all domestic remedies have been exhausted.

2.2 The case for the prosecution was that the author, in the presence of one Mr. E. Stewart and S. Floyd, assaulted his cousin, hitting him several times with a cutlass and causing his death by haemorrhage shock. At the trial, two witnesses, Mr. Stewart and Mr. Floyd gave evidence for the prosecution that, on 27 May 1988, the author approached the deceased who was working at an illegal distillery of "bush rum". The witnesses were sitting on a log next to the distillery drinking rum. The author for no apparent reason pulled out a cutlass and proceeded to hack his cousin to death. Stewart and Floyd both ran from the scene but did not raise alarm nor did either of them report to the police. The deceased's body was found later the same day some 400 yards away from the distillery.

2.3 An investigating police officer gave evidence at the trial that in the evening of 27 May 1988, after having received a report concerning the incident, he saw the author in the street, who then ran away. The officer added that he did not observe any wounds on the author at the time. He said he saw him next the following morning in front of the police station, sitting in the tray of a truck with his hands tied together with a piece of rope and bleeding from a wound in the back of his head and also on his right arm. Upon demand by the police officer, the author told him that he received the wounds earlier that morning and that villagers brought him to the police station.

2.4 The author made an unsworn statement from the dock, admitting that he had been with the deceased and the witnesses in the afternoon of 27 May 1988. He stated that an argument arose between the deceased and Stewart, upon which Stewart threatened the deceased with a cutlass. The author tried to intervene and received a blow at his right elbow, whereupon he fled the scene. Then he fell and his next recollection was that he awoke in the bush the following morning. He then stopped a van, which took him to the police station. The driver treated the author's wounds with pieces of clothes. Upon arrival, he was taken to the hospital.

The complaint

3.1 The author claims that he is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant. Between the date of the arrest and the date of his trial the author was remanded in custody for almost one and a half years. During that time he was in a cell (12 x 8 ft.) in which conditions were totally unsanitary, as there was no sunlight, no air, the men had to urinate and defecate anywhere in the cell, no bedding, nowhere to wash. After being sentenced to death, he has been detained in similar surroundings (10 x 8 ft.) with a light bulb directly overhead, which is kept on day and night. The author claims that he does not get any visitors and lacks privacy. He is handcuffed and placed in a box (3 x 3 ft.) when he consults his attorney. During the interview at least two guards are standing directly behind the attorney. Furthermore, the author was denied an eye test until September 1996, even though his glasses did not fit since 1990. The author claims that he was prevented by the prison authorities to pick up his new glasses in person and that the glasses he received as prescribed do not sufficiently correct his sight.

3.2 It is also submitted that the long period of detention on death row constitutes a violation of article 7.

3.3 Furthermore, the author claims that he is a victim of a violation of articles 9, paragraph 3, and 14, paragraph 3 (c), since he was held for almost one and a half years in custody before being brought to trial on 6 October 1989.

3.4 It is further submitted that the author was deprived of his rights under article 14 of the International Covenant on Civil and Political Rights. In this context, the author submits that he should not have been prosecuted, since important facts had not been investigated and the evidence was not sufficient to convict him. In particular, he submits that no trail of blood was found between the distillery and the place where the corpse was found. Furthermore, at the time of arrest on 28 May 1988, the author was told that he was detained in order to assist the police in the investigation.

3.5 It is further alleged that the jury was misdirected by the judge on the evidence given by the witness Stewart, since the judge failed to give a corroboration warning although the witness had an obvious self-interest. Also, the judge did not leave the issue of the impact of drunkenness upon the charge to the jury, although there was sufficient evidence that the deceased and the witnesses were drunk at the time of the incident. It is further submitted that the judge's summing-up was highly prejudicial to the author.

3.6 It is submitted that the author never saw an attorney before the day of the trial. During the trial, legal assistance by way of legal aid was ordered and the attorneys advised the author to give unsworn evidence from the dock, threatening to withdraw from the case if he did not. This is said to constitute a violation of article 14, paragraph 3 (b) and (d).

3.7 As regards the appeal, it is submitted that, in December 1993, the author was assigned a legal aid attorney whom he did not want to represent him, since that attorney was just out of law school and did not know the case at all. Although, reportedly, the author informed the legal aid authorities of his objections, counsel continued to represent him, but never consulted with him.

The author had no opportunity to give instructions to his attorney and was not present at the appeal hearing. It is therefore submitted that the author has been deprived of an effective appeal in violation of article 14 (5).

3.8 It is stated that the same matter has not been submitted to another procedure of international investigation or settlement.

3.9 With regard to the commutation of his death sentence in June 1996, the author complains that the decision of the President to sentence him to 75 years of imprisonment with hard labour was unlawful and discriminatory. The author refers to the decision of the Judicial Committee of the Privy Council in the cases of Earl Pratt and Ivan Morgan and of Lincoln Anthony Guerra, and claims that his sentence should have been commuted to life imprisonment. The author submits that 53 other prisoners, who had been on death row for murder for more than five years, saw their sentence commuted to life imprisonment, which according to the author, means that they will be released after an average period of 12 to 15 years, whereas such parole is not available to him.

Issues and proceedings before the Committee

4. The communication was transmitted to the State party on 12 January 1996, and the State party was requested to make any submission relevant to the admissibility of the communication, not later than 12 March 1996. On 4 October 1996, the State party informed the Committee that the death sentence in the case of the author and in four other cases pending before the Committee had been commuted to a term of imprisonment with hard labour for a period of 75 years. No observations concerning the admissibility of the communication were received, despite a reminder sent to the State party on 20 November 1997.

Consideration of admissibility

5.1 At its sixty-fourth session in October 1998 the Committee considered the admissibility of the communication.

5.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

5.3 With regard to the requirement of exhaustion of domestic remedies, the Committee noted that the author appealed his conviction and that the Judicial Committee of the Privy Council rejected his application for special leave to appeal and that domestic remedies had been exhausted.

5.4 With regard to the author's claim that the judge's instructions to the jury were inadequate, the Committee referred to its prior jurisprudence and reiterated that it is generally not for the Committee, but for the appellate courts of States parties, to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were manifestly arbitrary or amounted to a denial of justice. The material before the Committee and the author's allegations did not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication was inadmissible, as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6. On 23 October 1998 the Human Rights Committee declared the communication admissible, insofar as it may raise issues under articles 7 and 10, paragraph 1, of the Covenant, concerning the conditions of the author's detention, both before and after conviction; under article 7, concerning the warrant for the author's execution after he had spent over six years on death row and after the judgement of the Privy Council in Pratt and Morgan; under articles 9, paragraph 3, and 14, paragraph 3 (c), concerning the delays in bringing the author to trial and in hearing his appeal; article 14, paragraphs 3 (b) and (d) and 5, concerning his representation at trial and at appeal; and article 26, concerning the author's claim that he is a victim of discrimination because of the sentence imposed upon him after commutation.

7. In several letters received after the case has been declared admissible, the author repeated his earlier claims.

Consideration of the merits

8.1 On 27 November 1998, 3 August 2000, 11 October 2001, the State party was requested to submit to the Committee information on the merits of the communication. The Committee notes that this information has not been received.

8.2 The Human Rights Committee has considered the present communication in the light of all information made available by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.3 The Committee regrets that the State party has not provided any information with regard to the substance of the author's claims. The Committee recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.

9.1 With regard to the conditions of the author's detention at State Prison, Port-of-Spain, both before and after conviction, the Committee notes that in his different submissions the author made specific allegations, in respect of the deplorable conditions of detention (see 3.1 above). The Committee recalls its earlier jurisprudence that certain minimum standards regarding the conditions of detention must be observed and that it appears from the author's submissions that these requirements were not met during the author's detention since 28 May 1988. In the absence of any response from the State party, the Committee must give due weight to the allegations of the author. Consequently, the Committee finds that the circumstances described by the author disclose a violation of articles 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, is not necessary to consider separately the claims arising under article 7.

9.2 Concerning the warrant for the author's execution after he had spent over six years on death row, the Committee reaffirms its jurisprudence that prolonged delays in the execution of a sentence of death do not, per se, constitute cruel, inhuman or degrading treatment. The Committee, therefore, finds that the facts before it, in the absence of further compelling circumstances, do not disclose a violation of article 7 of the Covenant.

9.3 With regard to the delays in bringing the author to trial, the Committee notes that the author was detained on 28 May 1988 and formally charged with murder on 2 June 1988. His trial began on 6 October 1989 and he was sentenced to death on 2 November 1989. Under article 9, paragraph 3, of the Covenant anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time. It appears from the transcript of the trial before the San Fernando Assizes Court that all evidence for the case of the prosecution was gathered by 1 June 1988 and no further investigations were carried out. The Committee is of the view that in the context of article 9, paragraph 3, in the specific circumstances of the present case and in the absence of any explanation for the delay by the State party, the length of time that the author was in pre-trial detention is unreasonable and, therefore, constitutes a violation of this provision.

9.4 With regard to the delays in hearing the author's appeal, the Committee notes that he was convicted on 2 November 1989 and that his appeal was dismissed on 22 March 1994. The Committee recalls that all stages of the procedure must take place "without undue delay" within the meaning of article 14, paragraph 3 (c). Furthermore, the Committee recalls its previous jurisprudence that article 14, paragraph 3 (c), should be strictly observed in any criminal procedure. In the absence of an explanation by the State party, the Committee, therefore, finds that a delay of four years and five months between the conviction and the dismissal of his appeal constitutes a violation of article 14, paragraph 3 (c), of the Covenant in this regard.

9.5 Concerning the author's representation at trial, the Committee notes that counsel was not assigned to him until the day of the trial itself. The Committee recalls that article 14, paragraph 3 (b), provides that the accused must have time and adequate facilities for the preparation of his defence. Therefore, the Committee finds that article 14, paragraph 3 (b), was violated.

9.6 The author further claims that at the Appeals Court he was assigned a legal aid attorney, whom he rejected as his representative. Article 14, paragraph 3 (d), stipulates the right to defend oneself in person or through legal assistance of his own choosing. However, the Committee recalls its previous jurisprudence that an accused is not entitled to choice of counsel if he is being provided with a legal aid lawyer, and is otherwise unable to afford legal representation. Therefore, the Committee finds that article 14, paragraph 3 (d), was not violated in the present case.

9.7 Furthermore, the author claims that he was deprived of an effective appeal because he was represented by an attorney who never consulted him and to whom the author could give no instructions. In this connection the Committee considers that appeals are argued on the basis of the record and that it is for the lawyer to use his professional judgement in advancing the grounds for appeal, and in deciding whether to seek instructions from the defendant. The State party cannot be held responsible for the fact that the legal aid attorney did not consult with the author. In the circumstances of the instant case, the Committee is not in a position to find a violation of article 14, paragraph 3 (d) and 5, with regard to the author's appeals hearing.

9.8 Concerning the author's claim that he is a victim of discrimination because of the commutation of his death sentence to 75 years of imprisonment with hard labour, the Committee notes that according to information provided by the author, the State party in 1996 commuted death sentences of prisoners who had been on death row for more then five years to life imprisonment in 53 cases, on the basis of constitutional provisions on commutation of death sentences. The Committee recalls its established jurisprudence that article 26 of the Covenant prohibits discrimination in law and in fact in any field regulated and protected by public authorities. The Committee considers that the decision to commute a death sentence and the determination of a term of imprisonment is within the discretion of the President and that he exercises this discretion on the basis of many factors. Although the author has referred to 53 cases where the death penalty was commuted to life imprisonment, he has not provided information on the number or nature of cases where death sentences were commuted to imprisonment with hard labour for a fixed term. The Committee is therefore unable to make a finding that the exercise of this discretion in the author's case was arbitrary and in violation of article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 3 (b) and (c) of the Covenant.

11. Under article 2, paragraph 3, of the Covenant, Mr. Teesdale is entitled to an effective remedy, including compensation and consideration by the appropriate authorities of a reduction in sentence. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion of Committee member Mr. Rajsoomer Lallah (concurring)

I agree with the views of the Committee but would wish to add some observations on the length of the term of imprisonment of 75 years to which the sentence of the author was commuted.

The author did not raise any issue on the possible impact of the commuted sentence, by reason of its length, on the author's rights and the State party's obligations under article 10 (1) and (3) of the Covenant. The result is that the State party was not given an opportunity of responding to that issue and the Committee could not make a pronouncement on it.

The issue is nevertheless important as article 10 (1) requires that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Would imprisonment for 75 years meet that standard?

Further, article 10 (3) requires that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Both reformation and social rehabilitation assume that a prisoner will be released during his expected lifetime. Would the commuted sentence meet this requirement?

The State party may still wish to take these observations into account in considering the reduction of the sentence of the author.

(Signed) Rajsoomer Lallah

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee members Mr. David Kretzmer and Mr. Ivan Shearer (partly dissenting)

In the present case the author claimed he was a victim of discrimination since his death sentence was commuted to 75 years' imprisonment with hard labour, while in the same year, the State party commuted the death sentences of 53 prisoners to life imprisonment. The State party did not contest these facts, nor did it offer any explanation as to the alleged difference in treatment between the author and the other persons who had been sentenced to death. While we accept that the power to grant a pardon or commutation of sentence is by its very nature subject to wide discretion and that its exercise will be based on various factors, this power, like any other governmental power, must be exercised in a non-discriminatory manner so as to ensure the right of all individuals to equality before the law. Once the author had argued that he had been treated in a different way from people in a like situation, it was incumbent on the State party to show that the difference in treatment was based on reasonable and objective criteria. In our mind, in the absence of such an explanation by the State party the Committee should have held that the right of the author to equality before the law under article 26 of the Covenant was violated.

(Signed) David Kretzmer

(Signed) Ivan Shearer

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (partly dissenting)

I disagree with the Committee's conclusions with regard to the present communication on the grounds set forth below.

The author claims that he is a victim of discrimination because his death sentence was commuted to 75 years of imprisonment with hard labour, whereas that same year the President of the State party, on the basis of sections 87-89 of the Constitution of the Republic of Trinidad and Tobago, commuted death sentences to life imprisonment in the cases of 53 prisoners who, like him, had been on death row for murder for more than five years. The difference between the commutation of the sentences lies in the fact that in the case of life imprisonment prisoners are eligible for parole, whereas such parole is not available in the case of commutation to 75 years of imprisonment. The State party has not contested the merits, but only the claim that there were 53 cases of commutation to life imprisonment, maintaining that there were somewhat fewer.

The Committee notes that the commutation or pardoning of a sentence in the State party is at the discretion of the President of the Republic. Commutation or pardon to reduce or annul a sentence imposed for one or more offences is a well-established legal tradition. In the Middle Ages absolute monarchs exercised the right to grant clemency, which, in modern legal systems, has devolved upon constitutional monarchs, presidents or other authorities of the highest rank in the executive institutions of a State. But this discretionary authority has undergone significant changes over time. While it is a prerogative of and may also be at the discretion of the holder of this authority, in this case the President of the Republic, the discretional element relates to the appropriateness of the decision; discretion is not absolute and must be based on reasonable criteria, founded in ethics and equity, so as to exclude arbitrariness.

The right in all cases to seek pardon or commutation of a sentence, recognized by the International Covenant on Civil and Political Rights in its article 6 (4), is an absolute right possessed by any person condemned to death, but such is not true for the person with the authority to grant commutation, since this must be based on the criteria indicated above in conformity with the provisions of the Covenant. In the present case, as stated by the author, the President of the Republic has applied treatment to the author which differs from that accorded many other convicted prisoners in similar circumstances, without there being any explanation whatsoever by the State party that the distinction was based on reasonable and objective criteria. Accordingly the Committee concludes that the author is a victim of a violation of article 26 of the Covenant.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 678/1996, Gutierrez Vicanco v. Peru (Views adopted on 26 March 2002, seventy-fourth session)*

Submitted by:	Mr. José Luis Gutiérrez Vivanco (represented by APRODEH, a non-governmental organization)
Alleged victim:	The author
State party:	Peru
Date of the communication:	20 March 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2002,

Having concluded its consideration of Communication No. 678/1996, submitted by Mr. José Luis Gutiérrez Vivanco under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all the information submitted to it in writing by the author of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 20 March 1995 is Mr. José Luis Gutiérrez Vivanco, a Peruvian citizen who was sentenced to 20 years' imprisonment for a terrorist offence and later pardoned on humanitarian grounds on 25 December 1998. He states that he is a victim of violations by Peru of articles 7 and 14 (1), (2) and (3) (b), (c), (d) and (e) of the International Covenant on Civil and Political Rights. He is represented by the Pro Human Rights Association (APRODEH), a non-governmental organization.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdulfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of an individual opinion signed by one Committee member Mr. Ivan Shearer, is appended to the present document.

The facts as submitted by the author

2.1 The author was a student in the Faculty of Biology in San Marcos University, Lima, until the time of his arrest. He lived with his parents and seven brothers and sisters. He suffered from a chronic cardiac insufficiency, which prevented him from engaging in strenuous physical exercise.

2.2 On 27 August 1992, the author was arrested at the home of Luisa Mercedes Machaco Rojas, his fiancée. While he was in her house, the police arrived with his fiancée, and both were arrested and taken in a police van to the offices of the National Directorate against Terrorism (DINCOTE). In those offices the author was beaten and later taken back to the van, where the ill-treatment continued. He was then taken back to the DINCOTE offices. As a result of the ill-treatment, he had to be taken to the police hospital, where, owing to his chronic cardiac insufficiency, he was transferred immediately to the Dos de Mayo public hospital. He remained in custody in this hospital during the 15 days of police investigation, as stipulated for terrorism cases by the relevant legislation, namely, Decree-Law No. 25,475 of 6 May 1992.[1]

2.3 During this period of police custody the author was not represented by a defence lawyer. However, since he had been hospitalized, he was not asked to make any statement. He was accused by the police, on the basis of statements by other persons charged with him, of having taken part in subversive attacks against the Bata shoe shop and a restaurant.

2.4 The judicial examination was carried out in the offices of the Lima Tenth Criminal Court, which at that time specialized in terrorism cases. In his statements before that court, the author alleged that he had been subjected to physical ill-treatment. During the examination stage, he was represented by a lawyer of his choice.

2.5 The oral proceedings were held at private hearings in a room at Miguel Castro Castro Maximum Security Prison,[2] Lima, between 7 April and 17 June 1994, without the presence of witnesses or experts. The court was composed of secret judges who conducted the proceedings behind special windows which prevented them from being identified and with loudspeakers which distorted their voices. In addition, the judges were not necessarily specialists in criminal matters, but could be chosen from among all High Court and Labour Court judges. During this stage of the proceedings, the author was assisted by a lawyer, who was engaged by his mother on the day when the hearings began; this lawyer was in fact representing another defendant in the same proceedings. At the hearings, the senior government prosecutor, when making his oral charges, stated that he did not find the author criminally liable, but even so he was bringing charges against him pursuant to the law.[3]

2.6 On 17 June 1994, the Special Terrorism Division of the Lima High Court sentenced the author to 20 years' imprisonment; this sentence was subsequently confirmed by the Supreme Court of Justice on 28 February 1995. The Special Terrorism Division's sentence stated that the author's criminal responsibility had been proved in the interview with Lázaro Gago, one of the co-defendants, who stated that he not only knew the author and his fiancée, but had also made his home available for them to leave the goods taken during the subversive attacks on the Bata shoe shop. In addition, the sentence stated that the author's congenital illness could not serve as a legal basis for exempting him from all responsibility for the offence since several of the defendants had said that he was a member of Shining Path.

2.7 After the sentence, the author's mother was informed that he must change his lawyer, since the new legislation stipulated that in trials involving a terrorist offence, defence lawyers in Peru could not represent more than one accused person at the same time, with the exception of court-appointed lawyers.[4]

2.8 The author's mother, representing her son, lodged an application for judicial review of the facts with the Supreme Court in 1996. This court's proceedings were written and there were no public or private hearings. The application was dismissed on 21 April 1999.[5]

2.9 On 25 December 1998, Supreme Decision No. 403-98-JUS granted the author a pardon on humanitarian grounds, stating that as a consequence of his illness "the above-mentioned prisoner may suffer serious events and, in addition, he is suffering from serious organic disabilities; consequently, his release will not constitute a threat to social peace and collective security".

The complaint

3.1 The author alleges that he was subjected to ill-treatment at the time of his arrest, which constitutes a violation of article 7 of the Covenant. He adds that no investigation was undertaken into this matter, even though he reported it during the judicial examination stage.

3.2 The author alleges that there has been no trial with due guarantees, which constitutes a violation of article 14 (1) since the trial was held in private in a court composed of faceless judges, because the senior government prosecutor had an obligation under law to charge the defendants even if he considered them innocent and also because a false confession of guilt was included as evidence.

3.3 The author alleges a violation of article 14 (2) since, during the trial, account was taken only of his presence in his fiancée's home and the statement by one of his fellow defendants; no consideration was given to other evidence such as the statement by the witnesses during the police phase, the records of the body search and house search which yielded no grounds for charging him, and the medical examinations, which demonstrate that he cannot even run 50 metres without endangering his life.

3.4 The author maintains that there was unwarranted delay in reaching a decision on the application for judicial review, in violation of the provisions of article 14 (3) (c) of the Covenant.

3.5 The author alleges that he was never able to conduct his defence during the police stage since he was not present and that during the trial the law did not allow him to be defended by a lawyer of his choice, contrary to article 14 (3) (b) and (d).

3.6 He further alleges that the people who arrested him were never interrogated since the law does not allow this and that no witnesses ever appeared during the oral proceedings to challenge the statements by the fellow defendants, which may raise questions in the light of article 14 (3) (e).

Observations by the State party

4.1 In its observations of 6 January 1998 on admissibility and merits, the State party argues that the communication should be declared inadmissible in conformity with article 5 (2) (b) of the Optional Protocol since the doubts expressed by the author regarding the validity of the evidence raise a question which should be taken up nationally before a Peruvian court.

4.2 The State party considers that in the complaint it is not clearly explained which actual events and legal reasoning lead the author to conclude that there has been a violation of article 14 (1) of the Covenant. In addition, the State party declares that there is no need to demonstrate that the guarantees of due process have been complied with since respect for minimum guarantees was implicit in the normal development of the criminal proceedings against the author, in conformity with the pre-established procedures. In addition, if there were any comment relating to the proper development of the trial, the submission of an appeal to this end would be recorded in the relevant file, but this has not been done. For this reason, the State party maintains that there has been no violation of the provisions of article 14 (3) (b), (d) or (e).

4.3 The State party maintains that the presumption of the author's innocence was undermined by the police statement made by his fellow defendant, Lázaro Gago, who recognized the author and his fiancée as the persons who were keeping goods taken in the subversive attacks on the Bata shoe shop. In addition, Luisa Machaca Rojas, the author's fiancée, declared in her police statement that she was a member of the Peruvian Communist Party - Shining Path, together with her fiancé, giving details of all the actions in which they had participated together. Lastly, account was taken of the police statements by Daniel Prada Rojas and Jayne Taype Suárez, two fellow defendants.

4.4 As regards article 14 (3) (c), the State party affirms that although there was a certain delay in reaching a decision on the application for review, "undue" or "unwarranted" delay should have been determined by the Peruvian court competent to consider a complaint about what is claimed to be unwarranted delay in reaching a decision on an appeal. In other words, there exists within the Peruvian judicial system appropriate remedies for claiming "undue" delay in the administration of justice, and it is for a Peruvian court to consider a question of this type. In the present case, the relevant procedures were not used.

4.5 On 21 January 1999, the State party declared, in a note verbale, that the author had been granted a pardon on 25 December 1998 and had been released immediately.

Comments by the author

5.1 In his comments of 17 October 2000, the author responds to the State party's arguments and points out that, during the police investigation, article 6 of Decree-Law No. 25,659 was still in force and expressly prohibited applications for guarantees, habeas corpus and amparo. Consequently, there was no effective remedy which he could exercise in order to protect his rights to freedom and physical safety.

5.2 The author maintains that the purpose of the communication submitted is not to assert his innocence; consequently, the State party's objections referring to supposed allegations about the validity or otherwise of the evidence in determining his involvement should be dismissed.

5.3 The author refers to the State party's observations to the effect that the determining factors considered in establishing his responsibility were the police statements by the defendants, and maintains that those statements were taken at a stage when guarantees of due process do not exist. These guarantees include access to the evidence for the prosecution, the right to interrogate witnesses for the prosecution and the right to furnish evidence in one's defence.

5.4 The author says it should be borne in mind that as of the date of his arrest article 12 of Decree-Law No. 25,475 was in force; this provision allowed the police to hold detainees incommunicado without judicial authorization. In the present case, all the detainees said that they had been ill-treated while in police custody, with the result that the validity of the statements is doubtful, especially since there has been no investigation into this torture. The author accordingly maintains that the judicial proceedings against him were a mere formality whose only purpose was to validate the improper action of the police without paying the slightest heed to the judicial action taken. It was on this basis that the conviction was handed down, and this constituted a violation of the principle of innocence.

5.5 In relation to the possibility of lodging an appeal on the grounds of unwarranted delay in reaching a decision on the application for judicial review, the author points out that the State party has referred to the existence of a "competent Peruvian court" without saying which court this is. In his view, it is for the State party to say specifically which courts these are and to express its acceptance of internationally recognized rights. Furthermore, requiring an appeal against delay in reaching a decision on an application for review would lead to a never-ending succession of appeals.

Issues and proceedings before the Committee

6.1 In conformity with rule 87 of its rules of procedure, before considering any claims made in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 As to the requirement of exhaustion of internal remedies, the Committee takes note of the State party's challenge of the communication, maintaining that these remedies have not been exhausted and declaring the existence of available remedies before the competent Peruvian courts. However, the Committee considers that the State party has not specified what type of applications the author may submit and before which courts. Consequently, the Committee considers that in this case it has not been demonstrated that the internal judicial remedies were available.

6.4 With regard to the arguments relating to the violation of article 7 of the Covenant, the Committee observes that the State party has not touched on this question. However, the author has not provided any details of the ill-treatment received after his arrest, nor have the medical examinations carried out by the hospital given rise to any record of such ill-treatment. Consequently, in the present case, the Committee considers that this part of the communication is inadmissible through lack of substantiation under article 2 of the Optional Protocol.

6.5 With regard to the arguments relating to the violation of the principle of the presumption of innocence set forth in article 14 (2), the Committee considers that the arguments have not been sufficiently substantiated for the purposes of admissibility, and therefore declares them inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the author's arguments that he was never able to exercise his right to defence during the police investigation, the Committee considers that the author has been unable to substantiate for the purposes of admissibility that this constitutes a violation of article 14 (3) (b); it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.7 The Committee accordingly declares the rest of the communication admissible and will consider it as to the merits in the light of the information furnished by the parties, in conformity with the provisions of article 5 (1) of the Optional Protocol.

Consideration as to the merits

7.1 The author maintains that there has been a violation of article 14 (1) because the trial at which he was convicted of a terrorist offence was not conducted with due guarantees: the proceedings took the form of private hearings in a court composed of faceless judges; he could not summon as witnesses the police officers who arrested and interrogated him or question other witnesses during the oral stage of the proceedings, because the law does not allow this; his right to have a lawyer of his choice was restricted; and the government prosecutor was obliged by law to bring charges against the prisoner. The Committee takes note of the State party's declaration that the trial was conducted with minimum guarantees, since these are contained in the pre-established procedures and the author was tried in accordance with these procedures. Nevertheless, the Committee recalls its decision in the Polay Campos v. Peru case[6] regarding trials held by faceless courts, and trials in prisons to which the public are not admitted, at which the defendants do not know who are the judges trying them and where it is impossible for the defendants to prepare their defence and question witnesses. In the system of trials with "faceless judges" neither the independence nor the impartiality of the judges is guaranteed, which contravenes the provisions of article 14 (1) of the Covenant.

7.2 With regard to the author's claim that there was a violation of article 14 (3) (c), the Committee considers that the State party has confined itself to maintaining that the said delay ought to have been complained of in the national courts and has not succeeded in demonstrating why, in the circumstances of the case, no decision was taken on the application for review until 1999; that application had been made in 1996. The Committee accordingly considers that there has been a violation of article 14 (3) (c).

8. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts which have been set forth constitute violations of article 14 (1) and (3) (c), of the Covenant.

9. Under article 2 (3) (a) of the Covenant, the State party has the obligation to provide an effective remedy, including compensation, to Mr. José Luis Gutiérrez Vivanco. In addition, the State party has the obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that, in acceding to the Optional Protocol, the State party has recognized the Committee's competence to determine whether there has been a violation of the Covenant and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and applicable remedy in the event that a violation has been found to have been committed, the Committee wishes to receive information from the State party within 90 days on the measures it has adopted to give effect to the Committee's decision. It also requests the State party to publish the Committee's decision.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Decree-Law No. 25,475 of 6 May 1992 relating to the offence of terrorism provides in article 12 that the Peruvian National Police shall be responsible for investigating terrorist offences through the DINCOTE. This Directorate is empowered to decide whether the evidence it gathers is sufficient to bring charges. Thus, in accordance with this article, the police are empowered to detain suspects for 15 days and are only obliged to notify the judge and the public prosecutor's office within 24 hours of the arrest. Article 12 (d) stipulates that during this period the police may order detainees to be held completely incommunicado.

[2] Article 16 of the above-mentioned Decree provides that the trial shall be held in the prison establishment concerned so that the judges, members of the Public Prosecutor's Office and judicial officials may not be identified visually or orally by the defendants or defence lawyers.

[3] Under article 13 (d) of the Decree, senior government prosecutors have an obligation to bring charges, and consequently cannot express an opinion on the innocence of the defendants, even if there is no evidence against them.

[4] Article 18 of the Decree-Law.

[5] It should be pointed out that at the time when the author submitted his communication to the Human Rights Committee no decision had yet been taken on the application for review.

[6] Communication No. 577/1994, Views adopted on 6 November 1997.

APPENDIX

Individual opinion of Committee member Mr. Ivan Shearer (partly concurring)

I have joined the Views of the Committee in this case. However, I think it desirable to make clear that the Committee has not condemned the practice of "faceless justice" in itself, and in all circumstances. The practice of masking, or otherwise concealing, the identity of judges in special cases, practised in some countries by reason of serious threats to their security caused by terrorism or other forms of organized crime, may become a necessity for the protection of judges and of the administration of justice. When States parties to the Covenant are faced with this extraordinary situation they should take the steps set out in article 4 of the Covenant to derogate from their obligations, in particular those arising from article 14, but only to the extent strictly required by the exigencies of the situation. These statements of derogation should be communicated to the Secretary-General of the United Nations in the manner provided in that article. In formulating any necessary statements the States parties should have regard to General Comment No. 29 (States of Emergency) adopted by the Committee on 24 July 2001. In the present case the State party presented no observations on the claims of the author based on any situation of emergency. Nor had the State party made any declarations of derogation under article 4 of the Covenant. Hence those possible aspects of the case did not arise for determination.

(Signed) Ivan Shearer

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

F. Communication No. 683/1996, Wanza v. Trinidad and Tobago (Views adopted on 26 March 2002, seventy-fourth session)*

Submitted by:	Mr. Michael Wanza (represented by Stephen Chamberlain of the London law firm of Nabarro Nathanson)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	11 March 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2002,

Having concluded its consideration of Communication No. 683/1996, submitted to the Human Rights Committee by Mr. Michael Wanza under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Michael Wanza, a Trinidadian citizen and former mason, born in 1964, who at the time of the submission of the communication was awaiting execution at the Frederick Street State Prison in Port-of-Spain. He claims to be a victim of violations by Trinidad and Tobago of articles 7, 10, paragraph 1, 14, paragraphs 3 (c) and 5, of the Covenant. He is represented by counsel. On 24 June 1996, the author's death sentence was commuted to 75 years' imprisonment with hard labour.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 Mr. Wanza was convicted of murder in the High Court of Port-of-Spain on 28 February 1989 and sentenced to death. The Court of Appeal of Trinidad and Tobago dismissed his appeal on 20 January 1994. A subsequent petition for special leave to appeal was dismissed by the Judicial Committee of the Privy Council on 11 December 1995.

2.2 On 8 March 1996, a warrant was read to Mr. Wanza for his execution to take place on 13 March 1996. A constitutional motion was filed on his behalf after the issuance of the warrant, with a view to obtaining a stay of execution. A stay was granted, pending the result of the hearing of the constitutional motion. On 11 March 1996, the author's representative submitted the case under the Optional Protocol; a request for interim protection under rule 86 of the Committee's rules of procedure was issued on 14 March 1996. In June 1996, the author's death sentence was commuted and he was removed from the death row section of the prison.

The complaint

3.1 Counsel contends that Mr. Wanza is a victim of a violation of articles 7 and 10, paragraph 1, since he was detained on death row for a period of seven years and four months between his conviction and the commutation of his death sentence in June 1996. In his initial submission, counsel argues that the delay would make the execution of the death sentence unconstitutional. Reference is made in this respect to the jurisprudence of the Judicial Committee of the Privy Council in Pratt and Morgan and in Guerra v. Baptiste, and of the Supreme Court of Zimbabwe.[1]

3.2 Counsel contends that the anguish suffered by Mr. Wanza over a period exceeding seven years, during which he constantly faced the prospect of his own execution, combined with the conditions under which he was detained in the death row section of the State Prison, amount to cruel, inhuman and degrading treatment within the meaning of articles 7 and 10 (1) of the Covenant. In this context, counsel submits that the author was confined alone in his cell for 22 hours a day, and that he spends much of his time in enforced darkness.

3.3 From the author's affidavit in support of his constitutional motion, it appears that he claims that he is confined in a small cell (nine by six feet), which contains a bed, table, chair and a slop pail. There is no window, only a small ventilation hole of 18 by 8 inches. The entire cell block is illuminated by means of fluorescent lights which are kept on all night and affects the author's ability to sleep. Apart from the customary one hour exercise in the yard, he was only permitted to leave his cell to meet with visitors and to have a bath once a day. On Sundays and holidays he could not leave the cell because of lack of prison staff.

3.4 Counsel alleges a violation of article 14, paragraph 3 (c), juncto paragraph 5, because of the Court of Appeal's failure to hear Mr. Wanza's appeal within a reasonable time: it is submitted that a delay of almost five years for adjudicating an appeal against conviction and sentence in a capital case is wholly unacceptable. Reference is made to General Comment 13 [21] of the Human Rights Committee.

State party's observations

4. By submission received on 9 July 1996, the State party argues that because of the author's pending constitutional motion, the complaint should be held inadmissible on the ground of non-exhaustion of domestic remedies. On 4 October 1996, the State party confirms the commutation of the author's death sentence to 75 years' imprisonment with hard labour.

The Committee's admissibility decision

5.1 At the sixty-first session, the Committee considered the admissibility of the communication. It observed that the constitutional motion filed on the author's behalf has become moot with the commutation of his death sentence by the President of Trinidad and Tobago and that accordingly, there were no further available and effective remedies which the author would be required to exhaust.

5.2 The Committee considered that the author had sufficiently substantiated, for purposes of admissibility, his claims under articles 7 and 10 (1), insofar as they related to the conditions of his detention on death row, and under article 14, paragraph 3 (c), juncto paragraph 5, on account of the delay in the adjudication of his appeal.

6. Accordingly, on 14 October 1997, the Committee declared the communication admissible insofar as it appeared to raise issues under articles 7, 10 (1) and 14, paragraph 3 (c), juncto paragraph 5, of the Covenant.

State party's submission on the merits

7.1 By note of 12 May 1999, the State party forwarded its observations on the merits of the communication. With regard to the conditions of detention, the State party notes that the author has made only general allegations, such as that he was confined in a single cell for 22 hours per day and that much of his time was spent in enforced darkness. The State party denies that the conditions of the author's detention, either on death row or since the commutation of his sentence, violate the Covenant. In this connection, the State party refers to court judgements in cases where similar allegations were made[2] and where the court, after having heard both prison officials and convicts found that the circumstances did not amount to cruel treatment. The State party also refers to the Human Rights Committee's Views in the case of Dole Chadee et al.,[3] where the Committee found no breach of article 10 of the Covenant with regard to prison conditions in Trinidad and Tobago. The State party concludes that at all times the author has been treated with respect for the inherent dignity of the human person and that he has produced no evidence to substantiate the allegation of torture, cruel, inhuman or degrading treatment or punishment.

7.2 With regard to the author's claim that he is a victim of a violation of articles 7 and 10 of the Covenant, because of the length of time spent on death row, the State party refers to the Human Rights Committee's jurisprudence that prolonged detention on death row does not per se constitute cruel, inhuman or degrading treatment in the absence of some further compelling circumstances. In the present case, no such circumstances exist, according to the State party.

The State party rejects the author's argument that conditions of detention may render the carrying out of the death sentence unlawful and refers in this context to Fisher v. Minister of Public Safety (No.1) [1998] A.C. 673 and Hilaire and Thomas v. A.G. of Trinidad and Tobago [1999].

7.3 With regard to the alleged delay in hearing the appeal, the State party argues that the period between the conviction and the hearing of the appeal was not unreasonable in the circumstances prevailing in the country at that time (following an attempted coup d'état). There had been an increase in the crime rate putting great pressure on the courts and leading to a backlog of cases. Difficulties were also experienced in the speedy preparation of a complete and accurate court record, causing delays. Since then, procedural reforms have been carried out to avoid such delays. Financial and other resources have been allocated to the judiciary and additional judges have been appointed both to the High Court and to the Court of Appeal. A computer aided transcription unit has been put in place to ensure the availability of a complete and accurate court record with the minimum of delay. As a result, appeals are now heard within one year of the conviction.

8. Despite two reminders, no comments to the State party's submissions were received from the author's counsel.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's claim that his conditions of detention amounted to a violation of articles 7 and 10 (1) of the Covenant, the Committee notes that the information provided by counsel and the author contradicts itself in respect to the light in the cell. However, the remaining specific allegations on the poor conditions of detention, in particular, that the cell is small and does not contain a window but a ventilation hole of 18 by 8 inches, that the author was kept in this cell for 22 to 23 hours a day, and that on weekends and holidays he was not allowed to leave the cell because of lack of prison staff, have not been contested by the State party, except in a very general way. According to the Committee's prior jurisprudence, such conditions sustain the finding of a violation of article 10 (1) in the instant case. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to consider separately the claims arising under article 7.

9.3 With regard to the author's claim that his prolonged detention on death row constitutes a violation of articles 7 and 10 (1), the Committee notes that the author was kept on death row from his conviction on 28 February 1989 until 24 June 1996, when his sentence was commuted. The Committee refers to its previous jurisprudence[4] that prolonged detention on death row per se does not constitute a violation of articles 7 and 10 (1) of the Covenant, in the absence of further compelling circumstances. In the Committee's opinion, the facts before it do not show the existence of further compelling circumstances beyond the length of detention on death row. The Committee concludes that in this respect the facts do not reveal a violation of articles 7 and 10, paragraph 1 of the Covenant.

9.4 With regard to the delay of almost five years between the author's conviction and the determination of his appeal, the Committee has noted the State party's explanations in particular its statement that it has taken steps to remedy the situation. Nevertheless, the Committee wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe.[5] Article 14, paragraph 3 (c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of almost five years between the author's conviction in February 1989 and the judgement of the Court of Appeal, dismissing his appeal, in January 1994, is incompatible with the requirements of article 14, paragraph 3 (c) juncto article 14, paragraph 5 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 10, paragraph 1, and 14, paragraph 3 (c) juncto paragraph 5, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Wanza with an effective remedy, which includes consideration of early release.

12. On becoming a State party to the Optional Protocol, Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Pratt and Morgan v. Attorney-General of Jamaica et al., Privy Council Appeal No. 10 of 1993, judgement of 2 November 1993; Guerra v. Baptiste and others [1995] All ER 583; Supreme Court of Zimbabwe, judgement S.C. 73/93 of 24 June 1993 in Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney-General of Zimbabwe.

[2] Joey Ramiah v. the Attorney-General of Trinidad and Tobago and the Commissioner of Prisons, H.C.A No. 1164 of 1998, High Court of Justice, 13 November 1998. The State party further refers to the Privy Council's acceptance of the findings by the Court of Appeal of Trinidad and Tobago in the case of Thomas and Hilaire that prison conditions did not amount to cruel and unusual treatment in violation of section 5 (2) (b) of the Constitution.

[3] Communication No. 813/1998, CCPR/C/63/D/813/1998, Views adopted on 29 July 1998.

[4] See, inter alia, the Committee's Views in Communication No. 558/1994, Erroll Johnson v. Jamaica, para. 8.2-8.5, Views adopted on 22 March 1996; CCPR/C/66/D/709/1996, Everton Bailey v. Jamaica, Views adopted on 21 July 1999, para. 7.6.

[5] See the Committee's Views in Lubuto v. Zambia, CCPR/C/55/D/390/1990, adopted on 31 October 1995, para. 7.3. See also the Committee's Views in Sextus v. Trinidad and Tobago, CCPR/C/72/D/818/1998, Views adopted on 16 July 2001, para. 7.3.

G. Communication No. 684/1996, Sahadath v. Trinidad and Tobago (Views adopted on 2 April 2002, seventy-fourth session)*

Submitted by:	Mr. R. S. (represented by Saul Lehrfreund of the London law firm of Simons Muirhead and Burton)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	13 March 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 April 2002,

Having concluded its consideration of Communication No. 684/1996, submitted to the Human Rights Committee by Mr. R.S. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 13 March 1996, is Mr. R.S., a Trinidadian citizen who claims to be a victim of a violation by Trinidad and Tobago[1] of articles 6 (1), 7 and 10 (1) of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel.

1.2 In accordance with rule 86 of the Committee's rules of procedure, the Committee requested the State party not to carry out the death sentence against the author while this communication was being considered. By letter of 4 October 1996, the State party informed the Committee that the death sentence of the author had been commuted to a term of imprisonment with hard labour for a period of 75 years.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 The author was convicted of murder and sentenced to death on either 14 January 1991 or 1992. The Court of Appeal of Trinidad and Tobago dismissed his appeal on 12 April 1994. The Judicial Committee of the Privy Council dismissed a subsequent petition for special leave to appeal on an unspecified date.

2.2 On 8 March 1996, the author was read a warrant for his execution on 13 March 1996. On Tuesday, 12 March 1996, a stay of execution was granted, with a view to obtaining a full psychiatric examination of the author. The author is believed to be mentally deficient, and counsel argued, in his initial submission, that it would be in violation of his rights under the Covenant to execute him under these circumstances.

2.3 On 9 March 1996, the author was visited at the State Prison by his counsel, Douglas Mendes. When counsel arrived at the prison gate and requested to see the author, the officer on duty made a circular motion with his index finger near his head, to indicate that the author was insane. The officer asked counsel whether in the circumstances he would still like to see the author and, upon counsel's insistence, said that special security arrangements would have to be made for the interview.

2.4 During the interview, counsel asked the author whether he wanted a constitutional motion to be filed on his behalf or not. At first, the author indicated that he wanted to be executed. After further discussion, he agreed to the filing of a constitutional motion. When counsel pointed to the contradictory behaviour of the author, the latter replied that he was confused and could not decide. Counsel ended the interview by telling the author that he would return later in the day, to allow him to make up his mind.

2.5 The author's appearance and demeanour, coupled with the prison guard's comments on his insanity, made counsel believe that the author was of unsound mind. He thus contacted a psychiatrist, Peter Lewis, who accompanied him to the prison in the afternoon of 9 March 1996. Mr. Mendes asked the author whether he wanted a constitutional motion to stop his execution to be filed, and the author replied in the affirmative. For the rest, counsel could not obtain further information from the author: he gave different dates for his conviction, was unaware that an appeal had been heard or that a petition to the Judicial Committee of the Privy Council had been filed. He could not remember the name of the lawyer who had represented him on trial and said that no lawyer had ever visited him for the preparation of the appeal. He further could not remember the name of the person of whose murder he had been convicted.

2.6 After interviewing the author, Mr. Lewis concluded in an affidavit that the author "is experiencing auditory hallucinations and is probably suffering from severe mental illness that may be significantly affecting his ability to think and behave normally. I recommend that a detailed examination of his mental status be conducted in order to determine the extent and nature of Mr. R.S.'s disorder".

2.7 With regard to the conditions of detention of the author, counsel submits that he visited the prison where the author was detained, on 16 July 1996, in order to meet with clients and to receive some information on this issue. Counsel then states the following:[2]

> "The information gained from 3 prisoners who had their sentences commuted from death to life imprisonment in 1984 reveal conditions which appear to be quite appalling, with far too many people sharing a single cell, no space to lie down let alone sleep, and degrading sanitary arrangements, to say nothing on the absence of useful employment, education and recreational facilities.
>
> "Prisoners who have had their sentence commuted to life imprisonment share cells measuring approximately 9'x 6' with between 9 and 12 other prisoners. Each cell consists of 2 bunks, therefore only 4 men can sleep at any one time. All the occupants of the cell share a single plastic bucket for all toilet functions. They are permitted to empty the contents of the bucket once a day. Ventilation consists of a single barred window measuring approximately 2 foot square. Each prisoner spends an average of 23 hours each day locked inside his cell, although exceptionally and unpredictably he and his cell mates are allowed out for as long as 6 hours."

2.8 As to detention on death row, counsel refers to the affidavits made by four other prisoners on death row, who were due to be executed at the same time as the author, and concludes that similar conditions applied to the author. Counsel submits the following:

> "The prisoners are kept confined in a very small cell measuring approximately 9 feet by 6. The cell contains a bed, table, chair and 'Slop Pail', that is, a bucket provided to each prisoner to use as a toilet. There is no window, only a small ventilation hole, measuring 18 inches by 8 inches approximately. The entire cell block is illuminated by means of fluorescent lights which are kept on all night and affects my [sic] ability to sleep. They are kept in this cell 23 hours every day except on weekends, public holidays, and days of staff shortage, when they are shut in for the entire 24 hours. Apart from the customary one hour exercise in the exercise yard, they are only permitted to leave their cells to meet with visitors and to have a bath once a day during which time they clean out their slop pail.
>
> "The hour's exercise is conducted with handcuffs on in an extremely small enclosure thus making meaningful exercise extremely difficult if not impossible. Visiting and other privileges are severely restricted. They are allowed two visits per week each of only 20 minutes duration. Writing materials are provided only upon a request being entered in the request book. Often there is no paper or pens available. Writing is permitted only between 4.30 p.m. and 7.15 p.m. on weekends and public holidays.
>
> "The persons on death row are subjected to three searches of cell and body every day. The final such search is conducted at 9.30 at night at which time they are often asleep. They will be awakened and searched accordingly. Shortly after this search, the three electronic alarm bells in death row are tested. The resulting effect of the noise

> makes it difficult to return to sleep, concluding that the author notes that cells measure approximately 9 by 6 feet, with an 18 inch hole for ventilation. The death row section is entirely illuminated by fluorescent lights, including at night, thereby impeding sleep. Prisoners are only allowed out of their cells one hour per day, except on weekends, when they are kept in 24 hours because of shortage of staff. Meaningful exercise is impossible, as prisoners remain handcuffed during the exercise period. They are permitted two 20-minute visits per week, and writing pads and books are severely restricted."

The complaint

3.1 The author submits that to issue a warrant for the execution of a mentally incompetent prisoner is in violation of customary international law and claims that he is a victim of violations of articles 6, 7 and 10 (1) of the Covenant, juncto ECOSOC resolutions 1984/50 and 1989/64, as he was kept on death row facing execution until July 1996, in his state of mental disturbance. The lack of psychiatric care at the State Prison in Port-of-Spain is also said to constitute a violation of articles 22(1), 24 and 25 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

3.2 The author argues that the psychological stress to which he was submitted before and after the issue of the warrant for his execution amounts to a violation of articles 7 and 10 (1). In this context, he points out that the practice in Trinidad was to read no more than two warrants of execution on the same day and at the same hour because the State Prison is not equipped to handle more executions simultaneously. In the author's case, five warrants were read on the same day and hour. In such circumstances, it is argued, the author would be forced to await his turn at the gallows, having to endure the sounds of and thoughts about the execution of the other prisoners taking place, possibly over hours.

3.3 Apart from the psychological stress, the author contends, the conditions of his detention both on death row and after commutation of his sentence at the end of June 1996 constitute violations of articles 7 and 10 (1).

The State party's observations on the admissibility of the communication

4.1 In a submission dated 21 June 1996, the State party made its observations on the admissibility of the communication.

4.2 The State party argued that because of the author's pending constitutional motion, the complaint should be held inadmissible on the basis of non-exhaustion of domestic remedies.

Decision on admissibility

5.1 At its sixty-first session, the Committee considered the admissibility of the communication. It observed that the constitutional motion filed on behalf of the author had become moot with the commutation of his death sentence by the President of Trinidad and Tobago. Accordingly, there were no further available and effective remedies, which the author was required to exhaust.

5.2 The Committee noted that the author had sufficiently substantiated, for purposes of admissibility, his claims under articles 6, 7 and 10 (1), insofar as they relate to the question of the circumstances of the issue of the warrant for his execution, lack of psychiatric treatment while on death row, and the conditions of detention both during his detention on death row and after commutation of his sentence. Accordingly, on 14 October 1997, the Committee declared the communication admissible as far as it raised issues under articles 6, 7 and 10 (1), of the Covenant. It also requested the State party to transmit to the Committee a copy of the trial transcript and of the judgement of the Court of Appeal in the case.

The State party's observations on the merits of the communication

6. Despite having been invited to do so by the decision of the Committee of 14 October 1997 and by two reminders of 22 September 2000 and 11 October 2001, the State party has not submitted any observations or comments on the merits of the case.

Issues and proceedings before the Committee

7.1 Having found the case admissible, the Committee proceeds to an examination of the substance of the author's claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.2 As to the author's claim that issuing of a warrant for the execution of a mentally incompetent person constitutes a violation of articles 6 and 7 of the Covenant, the Committee notes that the author's counsel does not claim that his client was mentally incompetent at the time of imposition of the death penalty and his claim focuses on the time when the warrant for execution was issued. Counsel has provided information that shows that the author's mental state at the time of the reading of the death warrant was obvious to those around him and should have been apparent to the prison authorities. This information has not been contested by the State party. The Committee is of the opinion that in these circumstances issuing a warrant for the execution of the author constituted a violation of article 7 of the Covenant. As the Committee has no further information regarding the author's state of mental health at earlier stages of the proceedings, it is not in a position to decide whether the author's rights under article 6 were also violated.

7.3 As to the author's claims that the conditions of detention in the various phases of his imprisonment violated articles 7 and 10, paragraph 1, in the absence of a response by the State party to the conditions of detention as described by the author, the Committee notes that author's counsel has provided a detailed description of the conditions in the prison in which the author was detained and has also claimed that no psychiatric treatment was available in the prison. As the State party has made no attempt to challenge the detailed allegations made by author's counsel, nor to contest that these conditions applied to the author himself, the Committee must give due credence to the counsel's allegations. As to whether the conditions as described violate the Covenant, the Committee considers, as it has repeatedly found in respect of similar substantiated allegations, that the author's conditions of detention as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to consider separately the claims arising under article 7.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate medical and psychiatric care. The State party is also under an obligation to improve the present conditions of detention so as to ensure that the author is detained in conditions that are compatible with article 10 of the Covenant, or to release him, and to prevent similar violations in the future.

10. On becoming a party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before the State party's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Initially, the Optional Protocol to the International Covenant on Civil and Political Rights entered into force for Trinidad and Tobago on 14 February 1981. On 26 May 1998, the Government of Trinidad and Tobago denounced the Optional Protocol. On the same day, it re-acceded, including in its instrument of re-accession a reservation "to the effect that the Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith". On 2 November 1999, the Committee decided that this reservation was not compatible with the object and purpose of the Optional Protocol and thus the Committee was not precluded from considering the communication. On 27 March 2000, the Government of Trinidad and Tobago denounced the Optional Protocol again.

[2] Counsel refers to general conditions of detention in the prison but does not expressly state that the author was personally subjected to these conditions.

H. Communication No. 695/1996, Simpson v. Jamaica (Views adopted on 31 October 2001, seventy-third session)*

Submitted by:	Mr. Devon Simpson (represented by counsel, Mr. J. E. Jamison and Mr. Jeremy Kosky of Clifford Chance, a law firm in London)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	19 March 1996 (initial submission)
Decision on admissibility:	29 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2001,

Having concluded its consideration of Communication No. 695/1996, submitted to the Human Rights Committee by Mr. Devon Simpson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication (initial submission dated 19 March 1996) is Devon Simpson, a Jamaican citizen, born on 17 August 1952, at the time of submission awaiting execution in St. Catherine's District Prison, Jamaica. His death sentence was commuted to life imprisonment on 24 February 1998. The author claims to be a victim of violations of articles 7 and 10, paragraph 1, and 14, of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

Facts as presented by the author

2.1 On 15 August 1991, the author was arrested on suspicion of murder. He was assaulted by the police and was refused medical treatment. He did not bring this matter to the attention of the authorities, as he was not aware that the beatings violated his rights. He was kept in a cell with 17 other inmates at the Half-Way-Tree Police Lock Up, where some of the inmates had already been convicted. Shortly afterwards, he was moved to the General Prison, where he shared a cell of 8 by 4 feet with five other inmates. There was no artificial light in the cell, no slop bucket, and he was only allowed to use the toilet once a day.

2.2 The author was provided with a lawyer by the Court Registrar as he did not have the means to hire one privately. He did not meet his lawyer before the preliminary hearing and his representation at the preliminary hearing was poor. The author's lawyer was not present for the hearing of two of the four prosecution witnesses as he claimed that he had to leave to be present in another court.

2.3 At trial the author was represented by three lawyers. The author only met one of the lawyers on one occasion for 15 minutes before the beginning of the trial. The lawyers did not sufficiently challenge the evidence against the author. In particular, the description given by one of the prosecution witnesses of the attacker, did not correspond with his physical characteristics, and this was not sufficiently pointed out by the author's lawyer. Consultations between the author and his lawyers during the trial were irregular.

2.4 At the beginning of the trial, the author was charged with two counts of non-capital murder. However, on the fifth day of the trial, the Judge allowed the amendment of the charges to capital murder. The author was re-arraigned, although, apparently by error, the charges put to the author were again charges of non-capital murder. Despite this, the judge appears to have assumed that he was hearing a capital murder trial. The author states that as a result of the amendment, he became nervous and consequently did not give a clear statement from the dock.

2.5 On 6 November 1992, the author was convicted of two offences of capital murder and sentenced to death by the Home Circuit Court in Kingston.[1]

2.6 Since his conviction, the author has been confined in a cell alone for periods of up to 22 hours each day, most of his waking time is spent in darkness making it impossible for him to keep occupied. Slop buckets are used, filled with human waste and stagnant water, and only emptied once per day. There is also no running water provided in the author's cell. Consequently, the author has to wait until he is released to get running water which he then stores in a bottle. It is also stated that the author slept on cardboard and newspapers on concrete until October 1994 when he was provided with an old mattress.

2.7 For several years the author has been experiencing an undiagnosed and untreated medical condition giving rise to symptoms of great pain and swelling in his testicle. He complains of a back problem, from which he has suffered since childhood, and which makes it difficult for him to sit upright for a long period of time. He has also developed eye problems because of the darkness in his cell. Although he was visited by a doctor in prison, the tablets the author has been given do not provide any relief and he has been refused specialist treatment.

2.8 Leave to appeal against convictions was granted by the Court of Appeal and the appeal was heard from 13 to 15 April and on 9 May 1994. The Court of Appeal allowed the author's appeal against both convictions of capital murder. It substituted convictions of non-capital murder, and passed a sentence of death upon the author, pursuant to section 3 (1A) of the Offences Against the Person (Amendment) Act 1992, which provides that multiple convictions of non-capital murder carry the death sentence. The author then appealed to the Judicial Committee of the Privy Council; the author's counsel considered that there were no grounds in law to appeal against conviction and petitioned solely against sentence. Special leave to appeal as a poor person was granted and the appeal was heard on 12 February 1996; on 7 March 1996, the Privy Council refused the appeal and upheld the imposition of the death sentence.

2.9 On 19 March 1996 the author, through his lawyers, petitioned the Human Rights Committee that a stay of execution be requested under rule 86 of its rules of procedure. On 4 April 1996, the author was placed in the "condemned cell" where a warrant for his execution on 18 April 1996 was read to him. On 11 April 1996, the Human Rights Committee, through its Special Rapporteur for New Communications, requested the State party not to carry out the death sentence against Simpson while his communication was under examination by the Committee. On 12 April 1996, the State party granted the author a stay of execution.

The complaint

3.1 Counsel claims that the author is a victim of violations of articles 7 and 10, paragraph 1, of the Covenant. The author was held in St. Catherine's District Prison on death row for over five years, which is said to constitute inhuman and degrading treatment. Counsel submits that, according to the Privy Council's judgement in Earl Pratt and Ivan Morgan v. the Attorney-General of Jamaica [1994] 2 AC 1, "... in any case in which an execution is to take place more than 5 years after sentence there will be strong grounds for believing the delay is such as to constitute inhuman or degrading punishment or other treatment".

3.2 Additionally, counsel claims that: (a) the conditions, described above in paragraphs 2.1 and 2.6, in which the author has been detained since his arrest, as well as his lack of medical treatment described above in paragraphs 2.1 and 2.7, amount themselves to cruel, inhuman and degrading treatment and punishment, in breach of articles 7 and 10, paragraph 1, of the Covenant; and (b) the period of delay, when addressed in the context of the conditions of detention and lack of medical treatment, constitutes a breach of articles 7 and 10, paragraph 1, of the Covenant. In this respect, counsel submits that numerous non-governmental organizations[2] have reported on the appalling conditions of the prison regime at St. Catherine's District Prison, observing that the facilities are poor: no mattresses, bedding or furniture in the cells; no sanitation in the cells; broken plumbing, piles of refuse and open sewers; until 1994 there was no artificial lighting in the cells; there are only small air vents through which natural light can enter; no employment opportunities available to inmates; no proper facilities to wash and infrequent permission to wash; no doctor attached to the prison, so that medical problems are generally treated by warders who receive very limited training; and inmates on death row occupy single cells where they are generally confined more than 18 hours per day.[3]

3.3 Counsel cites the Committee's Views on Communication No. 458/1991 (A. Mukong v. Cameroon), in which the Committee stated that "certain minimum standards regarding the conditions of detention must be observed regardless of the State party's level of development. (...) It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult".

3.4 Counsel also claims that the author is a victim of article 14, paragraph 3 (g), because he was assaulted in the police station after his arrest.

3.5 In addition, counsel complains about the mental anguish, caused to the author by his placement in the "condemned cell". It is argued that the author's state of mind at the time rested so much on the belief that a stay of execution would be put in place, that the failure of the Human Rights Committee to issue a rule 86 request, seeking a stay of execution on behalf of the author, within a reasonable time was inhuman and degrading.

3.6 Counsel refers to the irregularity in amending the charges against the author during the trial, and claims that the irregularity was such that the Court of Appeal should have ordered a retrial, rather than correcting it on paper by substituting convictions of non-capital murder. It is alleged that the Court of Appeal's failure to do so amounts to a violation of article 14, paragraph 1, in that the author was denied a fair trial.

3.7 It is also argued that, because of the amendment to the charges on the fifth day of the trial, article 14, paragraph 3 (a) and (b), were violated, since the author did not have time to communicate with his attorney about the true nature of the charge against him, and did not appreciate the consequence of the charges being upheld. It is argued that the defence may well have been conducted differently, if the author had been informed at the outset that he would be charged with capital murder. In this context, it is pointed out that the author's case was one of the first to be tried under the Offences against the Person (Amendment) Act 1992, and that Jamaican practitioners at the time were still grappling with the meaning and implications of the amended Act.

3.8 It is further claimed that, prior to the preliminary hearing, the author had inadequate time and facilities to prepare his defence and communicate with his attorney, in violation of article 14, paragraph 3 (b), and an inadequate opportunity to examine or procure witnesses, in violation of article 14, paragraph 3 (e). In this context, counsel claims that the fact that the author did not meet with his lawyer prior to the preliminary hearing violates paragraph 3 (b), and his lawyer's failure to be present for the examination of two of the witnesses violates paragraph 3 (e). Counsel claims that as there was insufficient preparation for his preliminary hearing, this culminated in poor quality representation at the trial hearing.[4] Counsel also claims a violation of article 14, paragraph 3 (b) because of the lack of consultation he had with his lawyer prior to the hearing itself. He claims that the author was only allowed 15 minutes with his lawyer when the prison warden asked her to leave. In addition, counsel claims a violation of article 14, paragraph 3 (e) because of counsel's behaviour during the trial as described in paragraph 2.3 above.

3.9 Counsel notes that with the Privy Council's decision, all available domestic remedies have been exhausted. He adds that a constitutional motion to the Supreme (Constitutional) Court of Jamaica is not a remedy available to the author.[5] Counsel further claims that constitutional remedies are in practice not available to indigents such as his client, since the State party does not provide legal aid for constitutional motions. He also claims that administrative remedies available to the author do not give a reasonable prospect of success.[6]

State party's submission on admissibility and counsel's comments thereon

4.1 In its submission of 10 October 1996, the State party denies that the length of the author's stay on death row constitutes a breach of the Covenant and refers to the Committee's jurisprudence. The State party also denies that the conditions of the author's detention on death row constitute a violation of article 10 of the Covenant.

4.2 In a further submission, dated 12 March 1997, the State party addresses the author's complaint concerning the amendment of the charges against him. The State party notes that this complaint was addressed by the Court of Appeal which chose to substitute convictions of non-capital murder. However, this decision did not affect the death sentence, because the Court of Appeal held that under the applicable statute the sentence for capital murder and for the instant case of multiple non-capital murder was the same. Thus, the State party is of the opinion that the matter was adequately dealt with by the Court of Appeal.

4.3 As to the manner in which counsel conducted the defence at trial, the State party does not accept that there was a breach of the Covenant for which the State can be held responsible. The State party explains that a thorough reading of the Act would show that where a person is convicted of more than one offence of non-capital murder, the outcome will be a death sentence.

4.4 With regard to the author's claim that he was assaulted by the police upon arrest, the State party notes that he did not bring this matter to the attention of the authorities, allegedly because he did not know that the beatings violated his rights. The State party finds this very difficult to believe and states that in the absence of any evidence to support the author's allegation, it does not accept that the alleged beating occurred.

4.5 With regard to the author's representation at the preliminary hearing, the State party submits that it is its responsibility to appoint competent counsel, but denies any responsibility for the way counsel conducts the defence.

4.6 The State party indicates that, with respect to the alleged violations of articles 7 and 10 (1), it will investigate the allegations concerning the alleged lack of medical treatment as well as the circumstances under which the author was placed in the condemned cell.

5.1 In a letter, the author states that on 5 March 1997, during a search, the warders destroyed his bed, some of his clothes, and some documents he had in his cell. They also removed his light bulb.

5.2 In his comments on the State party's submission on 12 March 1997, counsel argues that it is not enough for the State party to say that the result of the trial was fair, even though the conduct of the trial was irregular. Counsel underlines that the effect of the last minute amendment to the charges was not confined to the sentence, but had an impact on the author's mental state, which in turn affected the way and the extent to which he was able to participate in the conduct of his own defence. According to counsel, this may have affected the nature of the evidence adduced in Court. The Court of Appeal should thus have ordered a retrial and not simply substituted the sentence.

5.3 With regard to the representation at the preliminary hearing, counsel argues that any lawyer who fails to listen to the evidence of two out of four of the prosecution witnesses and who fails to discuss the case with his client before the hearing cannot be described as "competent".

Admissibility considerations

6.1 During its sixty-fourth session, the Committee considered the admissibility of the communication.

6.2 With regard to counsel's claim that there was insufficient time to prepare the author's defence, since his lawyers came to see him only once before the trial, the Committee noted that it would have been for the author's representatives or the author himself to request an adjournment at the beginning of the trial, if they felt that they did not have enough time to prepare the defence. It appears from the trial transcript that no adjournment was sought at the beginning of the trial, and that on a further occasion, an adjournment was granted by the judge to the defence counsel to study new evidence. The Committee considered therefore that this claim was inadmissible under article 2 of the Optional Protocol, as being unsubstantiated (para. 3.8).

6.3 With respect to the complaint that the author's representative did not properly cross examine the witnesses against him, the Committee recalled its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[7] The Committee were of the view that, in this instant case, there was no reason to believe that counsel at trial was not using her professional judgement in the interests of her client, and this part of the communication was thus considered inadmissible under article 2 of the Optional Protocol (para. 3.8).

6.4 With regard to the claim under article 14, paragraph 3 (a) and (b), in respect of the amended charges against the author, the Committee noted that any irregularity caused by the amendment of the charges in this respect was redressed by the Court of Appeal's decision to quash the convictions of capital murder. This part of the communication was thus considered inadmissible under article 2 of the Optional Protocol (para. 3.7).

6.5 With regard to the claim that the Court of Appeal's decision to change the author's convictions of capital murder to convictions of non-capital murder amounted to a denial of justice, and that the Court should have ordered a retrial instead, the Committee noted that this matter was not raised at the hearing of the author's appeal to the Judicial Committee of the Privy

Council, where the only issue argued was the sentence, not the convictions. This part of the communication was thus considered inadmissible for non-exhaustion of domestic remedies (para. 3.6).

6.6 With regard to the claim that the author was beaten upon arrest and that he was not given any medical treatment in August 1991, the Committee noted that this claim was not brought to the attention of the authorities on any occasion before the author's complaint to the Committee. This part of the communication was thus considered inadmissible for non-exhaustion of domestic remedies (para. 2.1).

6.7 On the issue of a violation of articles 7 and 10, paragraph 1, of the Covenant because of the time the author spent on death row, the Committee referred to its jurisprudence[8] that detention on death row for a specific period of time does not violate the Covenant, in the absence of further compelling circumstances. In the instant case, the Committee considered that, as the author had not invoked any ground, other than the period of time, in substantiation of his claim, this part of the communication was inadmissible under article 2 of the Optional Protocol (para. 3.1).

6.8 With regard to the claim that the author suffered mental anguish because he was read a warrant of execution although his lawyer had presented a communication to the Human Rights Committee, the Committee considered that the fact that it had not requested a stay of execution before the warrant of execution was read to the author, cannot amount to a violation of the Covenant attributable to the State party. This part of the communication was thus considered inadmissible under article 1 of the Optional Protocol (para. 3.5).

6.9 The Committee noted that the State party had indicated that it would investigate the author's complaints concerning the conditions of the author's detention and the lack of medical treatment. The Committee considered that these claims, as well as the author's claims concerning the conditions of his pre-trial detention, are admissible and should be examined on the merits.

6.10 The Committee also considered that the claim that the author's representative at the preliminary hearing was absent for the hearing of two out of four prosecution witnesses may raise issues under article 14, paragraphs 1 and 3 (d), which should be examined on the merits.

Issues and proceedings before the Committee

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol. The Committee notes with concern that the State party has not provided any further information clarifying the matters raised by this communication since the decision on the admissibility of the communication. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the authors' allegations, to the extent that they have been substantiated.

7.2 As to the allegation of a violation of articles 7 and 10 of the Covenant, the Committee notes that counsel has provided specific and detailed allegations concerning inappropriate conditions of detention prior to his trial and since his conviction, and lack of medical treatment. The State party has not responded to these allegations with specific responses but in its initial submission merely denies that the conditions constitute a violation of the Covenant and then goes on to say that it would investigate these allegations, including the allegation of the failure to provide medical treatment (para. 4.6). The Committee notes that the State party has not informed the Committee of the outcome of its investigations. In the absence of any explanation from the State party, the Committee considers that the author's conditions of detention and his lack of medical treatment as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person and are therefore contrary to article 10, paragraph 1. In light of this finding in respect of article 10, a provision which deals with the situation of persons deprived of their liberty and encompasses the elements set out generally in article 7, it is not necessary to consider separately the claims arising under that article (para. 3.2).

7.3 With respect to counsel's allegation that the author's lawyer was absent for the hearing of two of the four witnesses during the preliminary hearing, the Committee decided in its admissibility decision that this allegation may raise issues under article 14, paragraph 1 and paragraph 3 (d). The Committee recalls its prior jurisprudence that it is axiomatic that legal assistance be available at all stages of criminal proceedings, particularly in capital cases.[9] It also recalls its decision in Communication No. 775/1997 (Brown v. Jamaica), adopted on 23 March 1999, in which it decided that a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer. In the present case, the Committee notes that it is not disputed that the author's lawyer was absent during the hearing of two of the witnesses nor does it appear that the magistrate adjourned the proceedings until her return. Accordingly, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant (para. 3.8).

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Jamaica of articles 10, and 14, paragraph 3 (d) of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including adequate compensation, an improvement in the present conditions of detention and due consideration of early release.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] At the trial, the case rested on the eyewitness evidence of three witnesses. They alleged that they saw Simpson coming to George S. Cockett's grocery, where Cecil Cockett (George S. Cockett's father) and his brother Donovan were working at 7.30 p.m. on 8 August 1991. They testified that Simpson drew a gun and fired several shots, outside the shop and in the shop through the window, at Donovan, Cecil and Simon Cockett, which led to the death of Donovan and Cecil Cockett. One of the witnesses testified that a week before the incident, Simpson and Donovan Cockett had an argument in the course of which Simpson threatened to kill the whole family. The author made an unsworn statement in which he denied being present and stated that the accusations against him were being made falsely because one of the witnesses believed that Simpson had informed on him in relation to drug dealing, which had resulted in a police raid a few weeks before the incident.

[2] Counsel specifically refers to the Jamaican Council for Human Rights, America Watch and Amnesty International.

[3] This specific information is provided by counsel from a report compiled by Amnesty International following its mission to St. Catherine's Prison in November 1993.

[4] No further elaboration is provided by counsel or the author in relation to this issue.

[5] Counsel states that the law authorizes the imposition of the death penalty and the holding of an inmate in prison until the sentence of death is executed, and article 17 of the Jamaican Constitution provides that "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before".

[6] Counsel states that, as reported by the Jamaican Council for Human Rights and Amnesty International, "prisoners do not receive adequate redress from the prisoners' internal complaints procedure" and "serious complaints apparently (have) not been acted upon, (and) prisoners are alleged to have suffered reprisals from warders after complaining about ill-treatment."

[7] See, inter alia, the Committee's decision in Communication No. 536/1993, Perera v. Australia, declared inadmissible on 28 March 1995.

[8] See Communication No. 558/1994, Errol Johnson v. Jamaica, Views adopted on 22 March 1996.

[9] See, inter alia, the Committee's Views in respect of Communication No. 730/1996 Clarence Marshall v. Jamaica, adopted on 3 November 1998, Communication No. 459/991, Osbourne Wright and Eric Harvey v. Jamaica, adopted on 27 October 1995, and Communication No. 223/1987. Frank Robinson v. Jamaica, adopted on 30 March 1989.

I. Communication No. 721/1997, Boodoo v. Trinidad and Tobago (Views adopted on 2 August 2002, seventy-fourth session)*

Submitted by:	Mr. Clement Boodoo
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	13 June 1994 (initial submission)
Decision on admissibility:	5 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 April 2002,

Having concluded its consideration of Communication No. 721/1996, submitted to the Human Rights Committee by Mr. Clement Boodoo under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, initial submission dated 13 June 1994, is Clement Boodoo, a citizen of Trinidad and Tobago, serving a 10-year prison sentence at the time of submission, at Carrera Convict Prison in Trinidad and Tobago. Although the author does not invoke any specific provisions of the Covenant on Civil and Political Rights, the communication appears to raise issues under articles 7, 9, paragraph 3, 10, paragraph 1, 14, paragraph 3 (c), and 18, paragraph 1, of the Covenant. The author is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden

The facts as submitted by the author

2.1 The author states that he has been detained since 21 April 1989. On 24 January 1992, he was convicted and sentenced to 10 years' imprisonment for larceny. He states that his earliest release date is 31 December 1998.[1]

2.2 On 3 December 1990, while still in pre-trial detention, a map of the prison and a handmade weapon were found in the author's cell. As punishment, the author was placed in "cellular confinement" in a special high security cellblock for "escapees" in Carrera Prison. The author has remained in cellular confinement since. Such confinement consists of being locked in his cell for 23 hours a day, where he sleeps on a 1-inch thick carpet. He is allowed out only once a day for his airing and to bathe. His airing takes place in an area where inmate urinal and faecal wastes are disposed of, while other inmates are allowed their airings in a much larger, cleaner facility where they are allowed to exercise, play tennis and football, and engage in other recreational activities. His airing facility is damp, slippery, infested with worms and flies and faecal waste is often scattered on the ground. If the author complains about the conditions of his airing facility, he is left in his cell. In March 1991 his diet was restricted for 21 days.

2.3 As a result of his conditions of detention, the author is going blind. The prison doctor recommended at least three hours of sunlight a day for him, but this recommendation is not being implemented. While other inmates in the maximum security cell-block are allowed to take part in entertainment programmes and to worship at Christian or Muslim prayer services, the author has been denied these privileges.

2.4 After his conviction, and on having his photograph taken, the photographer forced him to have his beard shaved off, despite the author's claim that his Muslim faith forbids him to do so. Later that day, the author complained to the Inspector of Prisons, who gave the author permission to grow a beard again.

2.5 On 1 December 1992, the author was threatened by the warders, assaulted, and then returned to his cell. On 8 December 1992, he learnt from the prison authorities that an inmate had told them that he was masterminding an escape from prison.

2.6 On 18 January 1993, the author was searched, his prayer clothes were taken from him and his beard was forcibly shaven off. He was then assaulted by prison warders. He received blows to the head, chest, groin and legs and his request for immediate medical attention was ignored. Some weeks later, on complaining of continual pain, the medical officer gave him painkillers. On 27 May 1993, the author complained in writing to the Inspector of Prisons, but no action was taken.

2.7 From time to time, the author is transferred to Port-of-Spain prison for brief periods of incarceration. When at Port-of-Spain Prison, the author is left in a dimly-lit cell 24 hours a day and is not let out for recreation or airing. He does not know the reason why he is shuttled between prisons. Upon returning to Carrera Prison, the author is forced to strip naked, and pull back the foreskin on his penis. He is forced to pull his buttocks apart and squat 3 to 4 times in front of the prison guards. According to the author, no other prisoners are subjected to such humiliation.

2.8 The author has been assaulted by the warders on several occasions. In addition, he has received threats from the warders in connection with his complaint to the United Nations, and correspondence has not always been delivered to him. He further states that he has to request permission before writing to someone, and that on occasion he has been refused permission to write to the United Nations, the President, and his lawyer.

The complaint

3.1 The author claims that his rights have been violated by various aspects of his detention. He claims that the conditions under which he is kept are inhuman and that his eyesight is getting worse as a result.

3.2 He claims that he is being denied his right to exercise his religion as he is forbidden from worshipping at Muslim prayer services, his prayer books were taken from him, and on two occasions his beard was shaven off.

3.3 The author claims that the method employed by the prison warders to search him, as described in paragraph 2.6 and 2.7 is humiliating and no other prisoners are subjected to the same treatment and that the assaults upon his person are unprovoked and inhuman.

3.4 Finally, he claims that he has found it very difficult to receive information from or to forward information to the United Nations and individuals outside the prison service, due to the threats received by the warders and the interference with his mail.

Decision on admissibility

4.1 At its sixty-sixth session, the Committee considered the admissibility of the communication. It noted with concern the lack of cooperation from the State party, which had not submitted any observations on admissibility.

4.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

4.3 With respect to the exhaustion of domestic remedies, the Committee noted that the State party had not claimed that there are any domestic remedies yet to be exhausted by the author.

4.4 The Committee decided the following, "In the absence of observations from the State party, the Committee is not aware of any obstacles to the admissibility of the communication and considers that the communication may raise issues, in particular under articles 7, 10 and 18 of the Covenant, which should be examined on their merits." Consequently, on 5 July 1999, the Committee declared the communication admissible.

Issues and proceedings before the Committee

5.1 Notwithstanding reminders dated 25 September 2000, and 11 October 2001, the State party has not submitted any observations or comments on the merits of the case. The Committee regrets the absence of cooperation on the part of the State party and recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party must furnish the Committee, in good faith and within the imparted deadlines, with all the information at its disposal. In the absence of information from the State party, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2 The Committee notes that at the time of submission, Trinidad and Tobago was a party to the Optional Protocol. The withdrawal by the State party from the Optional Protocol on 27 March 2000, with effect as of 27 June 2000, does not affect the competence of the Committee to consider the merits of this communication.

6.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for in article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that the author was held in detention for a period of two years and nine months prior to his trial and reaffirms its constant jurisprudence that all stages of judicial proceedings should take place without undue delay. The Committee concludes that a period of 33 months between arrest and trial constituted undue delay, and cannot be deemed compatible with the provisions of article 9, paragraph 3, of the Covenant, in the absence of any explanation from the State party justifying the delay or explaining why the pre-trial investigations could not have been concluded earlier and why the author was detained throughout this period without trial. The Committee therefore finds that there has been a violation of article 9, paragraph 3, of the Covenant.

6.3 The Committee finds that the delay in bringing the author to trial, in the absence of any explanation from the State party, entailed a violation of article 14, paragraph 3 (c) of the Covenant.

6.4 The Committee notes the author's complaint in paragraphs 2.2 and 2.6 above that he has been held in appalling and insalubrious conditions as a result of which his eyesight has deteriorated. In the Committee's opinion, the conditions described therein are such as to violate his right to be treated with humanity and with respect for the inherent dignity of the human person and are therefore contrary to article 10, paragraph 1, of the Covenant.

6.5 With respect to the physical assaults on the author's integrity, in particular the incident described in paragraph 2.6 above, the threats of violence against him, and the treatment he received on being searched by the warders (para. 2.7), the Committee decides that, in the absence of an explanation from the State party, such treatment amounts to a violation of article 7 of the Covenant.

6.6 As to the author's claim that he has been forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him, the Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts. in the absence of any explanation from the State party concerning the author's allegations in paragraphs 2.3-2.6, the Committee concludes that there has been a violation of article 18 of the Covenant.

6.7 As to the author's claims concerning attacks on his privacy and dignity, in the absence of any explanation from the State party, the Committee concludes that his rights under article 17 were violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 9, paragraph 3, 10, paragraph 1, 14 (3) (c), 17 and 18, of the International Covenant on Civil and Political Rights.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy including compensation for the treatment to which he has been subjected. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report].

Note

[1] No up-to-date information has been provided as to whether the author is still in detention.

J. Communication No. 728/1996, Sahadeo v. Guyana (Views adopted on 1 November 2001, seventy-third session)*

Submitted by:	Mrs. Margaret Paul (Mr. Sahadeo's sister)
Alleged victim:	Mr. Terrence Sahadeo
State party:	Republic of Guyana
Date of communication:	10 November 1996 (initial submission)
Decision on admissibility:	29 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2001,

Having concluded its consideration of Communication No. 728/1996, submitted to the Human Rights Committee by Mrs. Margaret Paul (Mr. Sahadeo's sister), under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mrs. Margaret Paul. She submits the communication on behalf of her brother Terrence Sahadeo, a Guyanese citizen, awaiting execution in Georgetown prison in Guyana. She claims that her brother is an alleged victim of human rights violations by Guyana. Although she does not invoke any specific articles of the Covenant, the communication appears to raise issues under articles 7, 9, 10 and 14 of the Covenant.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Maxwell Yalden

The texts of two individual opinions signed by Committee members Mr. Martin Scheinin and Mr. Hipólito Solari Yrigoyen are appended to the present document.

The facts as submitted by the author

2.1 On 18 September 1985, Mr. Terrence Sahadeo, a friend called Mutez Ali, and the latter's girlfriend, Shireen Khan, were arrested in Berbice, Guyana, for the murder of one Roshanene Kassim committed earlier the same day.

2.2 The author states that Mr. Sahadeo and his co-accused were convicted and sentenced to death on 8 November 1989, four years and two months after their arrest. Apparently, two prior trials, in June 1988 and February 1989, had been aborted. On appeal, heard in 1992, a retrial was ordered. On 26 May 1994, Mr. Sahadeo and his co-accused were again convicted and sentenced to death. In 1996, their appeal was dismissed and the sentence confirmed.

2.3 From the incomplete notes of evidence of the retrial in 1994 submitted by the alleged victim, it appears that the case for the prosecution was that Terrence Sahadeo and Mutez Ali, according to a common plan including also Ms. Kahn, went to the house of the deceased in order to rob her. The alleged victim and Mr. Ali tied her up and put a knife through her throat. One witness for the prosecution testified at the trial that, in the morning of the incident, she had overheard that Ms. Kahn, in the presence of the accused, had enquired a little girl about who would be in the house of the deceased. They were told that Roshanene Kassim would be in the house by herself. Ms. Kahn then told the two other accused to go and see what they could get. The witness testified that, through a window two houses away, she saw Ms. Kassim in the house and the two men enter and return about 15 minutes later. She stated further that Mr. Sahadeo had blood on his hands that he washed away and that he handed over jewellery to Ms. Kahn. During her cross-examination the witness stated that she was held for two days by the police and tried to contact a lawyer, since she felt she was held against her will, before she made her statement.

2.4 The only other evidence against Mr. Sahadeo was his confession and other statements given by the investigating police officers. At the retrial in 1994, the voluntariness of the statement was challenged by the defence and examined in a voir dire. Mr. Sahadeo claimed that during police investigation in 1985 he was beaten by three policemen and that one policeman hit him on the toe with a small hammer. He then signed the statement. The prison doctor testified that when Mr. Sahadeo was admitted, he complained that he had been beaten on the back. When the doctor examined him, he found no injuries on his back, but discovered a toe injury, for which he gave him antibiotics. After the voir dire, the judge ruled the statement admissible.

2.5 The investigating police officers stated in the retrial in 1994 that the alleged victim was arrested, since he was found outside the house next to Kassim's with scratches on the upper part of his body. The officers denied having used force or threats when questioning the alleged victim and asserted that Mr. Sahadeo has received regular meals during his detention.

2.6 In a statement from the dock, Mr. Sahadeo denied having anything to do with the murder and stated that he had been beaten in order to force him to sign the confession on the third day after his arrest. It is submitted that after Mr. Sahadeo was arrested, he was taken to a doctor, who, after an examination of the alleged victim, issued a medical certificate to the police that he did not find any injuries on his body. The author further submits that the alleged victim was deprived of any food until the day after he made the confession.

The complaint

3.1 The author claims that her brother is innocent and that her brother and his friends were arrested only because they were strangers in the village, where they were spending a holiday. At the police station, Mr. Sahadeo was allegedly beaten and hit on his toenails with a small hammer so that he signed a prepared statement out of fear of further ill-treatment.

3.2 According to the author, there was no evidence to convict her brother. The medical certificate and the police file were all missing when the trial against her brother started, and the only evidence was the confession and the testimony given by one witness. The author claims that the witness first gave a statement to the police in which she did not inculpate her brother, but that she gave a second statement after having been in custody for two days without access to a lawyer. The author further alleges that the judge was biased, because she asked questions of the witnesses to assist the Prosecution and made contemptuous remarks. This is said to constitute miscarriage of justice.

3.3 Finally, it is claimed that the length of the procedure in the case has caused mental anguish.

Committee's decision on admissibility

4. On 21 November 1996, the Committee requested the State party to provide information about the admissibility of the communication. Under rule 86 of the Committee's rules of procedure, the State party was also requested not to carry out the death sentence against Mr. Sahadeo.

5. By note of 30 June 1998, the State party informed the Committee that it had no objection to admissibility, as Mr. Sahadeo had exhausted all available domestic remedies.

6.1 At its sixty-fourth session, the Committee considered the admissibility of the communication.

6.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 With regard to the claim that there was not sufficient evidence against Mr. Sahadeo to convict him, the Committee referred to its prior jurisprudence and reiterated that it is generally not for the Committee, but for the courts of States parties, to review the evidence against an accused, unless it can be ascertained that the evaluation of the evidence was manifestly arbitrary or amounted to a denial of justice. The material before the Committee and the author's allegations did not show that this was the case in Mr. Sahadeo's trial. Accordingly, this part of the communication was inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.4 With respect to the author's claim that the judge was biased, the Committee noted that the author has failed to provide any specific information in substantiation of this claim. This part of the communication was, therefore, declared inadmissible under article 2 of the Optional Protocol, for not having been substantiated for purposes of admissibility.

6.5 The Committee considered that the author's remaining claims were admissible and should be considered on the merits as they may raise issues under articles 9, paragraph 3, and 14, paragraph 3 (c), in relation to the length of the proceedings, and under articles 7 and 14, in relation to the circumstances in which the confession was signed.

7. On 23 October 1998, the Human Rights Committee, therefore, decided that the communication is admissible insofar as it may raise issues under articles 7, 9, paragraph 3, and 14 of the Covenant.

Issues and proceedings before the Committee

8.1 On 27 November 1998, 22 September 2000 and 24 July 2001, the State party was requested to submit to the Committee information on the merits of the communication. The Committee notes that this information has still not been received.

8.2 The Committee regrets that the State party has not provided any information with regard to the substance of the author's claims. The Committee recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.[1]

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

9.2 With regard to the length of the proceedings, the Committee notes that the alleged victim was arrested on 18 September 1985 and remained in detention until he was first convicted and sentenced to death on 8 November 1989, four years and two months after his arrest. The Committee recalls that article 9, paragraph 3, of the Covenant entitles an arrested person to trial within a reasonable time or to release. Paragraph 3 (c) of article 14 provides that the accused shall be tried without undue delay. The Committee recalls that, if criminal charges are brought in cases of custody and pre-trial detention, the full protection of article 9, paragraph 3, as well as article 14, must be granted. With respect to the alleged other delays in the criminal process, the Committee notes that Mr. Sahadeo's appeal was heard from the end of April to the beginning of May 1992 and, upon retrial, the alleged victim was again convicted and sentenced to death on 26 May 1994, two years and one month after the judgement of the Court of Appeal. In 1996, the appeal against that decision was dismissed and the sentence confirmed. The Committee finds that, in the absence of a satisfactory explanation by the State party or other justification discernible from the file, the detention of the author awaiting trial constitutes a violation of article 9, paragraph 3, of the Covenant and a further separate violation of article 14, paragraph 3 (c).

9.3 With regard to the circumstances in which the confession was signed, the Committee notes that Mr. Sahadeo identified those he holds responsible; further details of his allegations appear from the notes of evidence. The Committee recalls the duty of the State party to ensure the protection against torture and cruel, inhuman or degrading treatment as provided for in article 7 of the Covenant. The Committee considers that it is important for the prevention of violations under article 7 that the law must exclude the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. The Committee observes that Mr. Sahadeo's allegations of torture had been dealt with during the first trial in 1989 and again in the retrial in 1994. It appears from the notes of evidence of the retrial that Mr. Sahadeo had the opportunity to give evidence and that witnesses of his treatment during his detention by the police were cross-examined. The Committee recalls that it is in general for the courts of States parties, and not for the Committee, to evaluate the facts in a particular case. The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts were manifestly arbitrary or amounted to a denial of justice. In the circumstances, the Committee finds that the facts before it do not sustain a finding of a violation of article 7 and article 14, paragraph 3 (g), of the Covenant in relation to the circumstances in which the confession was signed.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9, paragraph 3; and 14, paragraph 3 (c), of the Covenant.

11. The Committee is of the view that Mr. Sahadeo is entitled, under article 2, paragraph 3 (a), to an effective remedy, in view of the prolonged pre-trial detention in violation of article 9, paragraph 3, and the delay in the subsequent trial, in violation of article 14, paragraph 3 (c), entailing a commutation of the sentence of death and compensation under article 9, paragraph 5, of the Covenant. The State party is under an obligation to take appropriate measures to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Guyana recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an enforceable effective remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] Communication No. 760/1997, J.G.A. Diergaardt et al. v. Namibia, para. 10.2

APPENDIX

Individual opinion of Committee member Mr. Martin Scheinin (partly dissenting)

I share the view of the majority on two important points: (a) that the Covenant was violated in the course of the criminal case against Mr. Sahadeo, resulting in the imposition of capital punishment and (b) that, as a result, the obligation of the State party under article 2 (3) of the Covenant to afford an effective remedy must entail that the victim is allowed to preserve his life. As prescribed in article 6 (2) of the Covenant, capital punishment may never be imposed through a procedure that entails a violation of the Covenant.

Where I dissent is the majority's approach to what conclusions should be drawn from how the confession statement was handled in the course of the judicial proceedings. Before the Committee Mr. Sahadeo, who is on death row in Georgetown prison, was represented by his sister, a lay person. As the State party has not provided the Committee with any information whatsoever, except its blanket consent to the admissibility of all aspects of the communication, I take the approach that the incomplete nature of the file cannot be held against Mr. Sahadeo.

It is generally for the courts of States parties and not for the Committee to review the evidence against an accused. However, in the present case it appears from the incomplete materials submitted to the Committee that when presenting the evidence related to the credibility of Mr. Sahadeo's testimony that he signed the confession statement under ill-treatment, the presiding judge used language that was prejudicial to the defendant. For instance, he referred to Mr. Sahadeo's colour of skin as basis for an inference that ill-treatment would have left marks that would have been visible in the medical inspection that took place afterwards, in addition to the bruise on the toe that was recorded. As the court, consequently, did not address the issue of possible coercion and ill-treatment in a proper way in a case that led to the imposition of capital punishment, I find that there has been a violation of articles 7 and 14 of the Covenant.

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I disagree with the Committee's opinion on the following grounds:

The author alleges that the police extracted his confession by means of beatings and ill-treatment, including a hammer blow to one toe. The prison doctor confirms that Mr. Sahadeo complained of being beaten on the back and that he had an injury to the foot. He also states that he therefore prescribed antibiotics. Later, in the dock, the author repeated his allegations that he had been beaten in order to make him sign a confession. This confession was the principal piece of evidence produced by the Public Prosecutor, and was used to justify the death sentence.

In its General Comment No. 20, the Committee finds that, for the discouragement of violations under article 7, it is important for the law to prohibit the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. The State party does not contest the alleged victim's claim to have been beaten, and the court did not consider his allegations of torture until four years had passed. As the Committee has stated on other occasions, an absence of comment by the State party is tantamount to a lack of cooperation insofar as the State party has failed to comply with its obligation under article 4, paragraph 2, of the Optional Protocol, to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State.

The Committee is of the view that the facts before it disclose a violation by the State party of article 7 of the Covenant, and that the use of the contested confession in court as grounds for a conviction for murder also constitutes a violation of articles 14, paragraph 3 (g), and 6, paragraph 2, of the Covenant. In accordance with article 2, paragraph 3 (a), of the Covenant, the author has the right to an effective remedy, which entails commutation of the death sentence. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

K. Communication No. 747/1997, Des Fours v. The Czech Republic (Views adopted on 30 October 2001, seventy-third session)*

Submitted by:	Dr. Karel Des Fours Walderode (deceased in February 2000) and his surviving spouse Dr. Johanna Kammerlander (counsel)
Alleged victims:	The author and his surviving spouse
State party:	The Czech Republic
Date of communication:	21 November 1996
Decision on admissibility:	19 March 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2001,

Having concluded its consideration of Communication No. 747/1997, submitted to the Human Rights Committee by the late Dr. Karel Des Fours Walderode and Dr. Johanna Kammerlander under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The original author of the communication was Dr. Karel Des Fours Walderode, a citizen of the Czech Republic and Austria, residing in Prague, Czech Republic. He was represented by his spouse, Dr. Johanna Kammerlander, as counsel. He claimed to be a victim of violations of article 14, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

by the Czech Republic. The Covenant was ratified by Czechoslovakia in December 1975, the Optional Protocol in March 1991.[1] The author passed away on 6 February 2000, and his surviving spouse maintains the communication before the Committee.

The facts as submitted

2.1 Dr. Des Fours Walderode was born a citizen of the Austrian-Hungarian empire on 4 May 1904 in Vienna, of French and German descent. His family had been established in Bohemia since the seventeenth century. At the end of the First World War in 1918, he was a resident of Bohemia, a kingdom in the former empire, and became a citizen of the newly created Czechoslovak State. In 1939, because of his German mother tongue, he automatically became a German citizen by virtue of Hitler's decree of 16 March 1939, establishing the Protectorate of Bohemia and Moravia. On 5 March 1941, the author's father died and he inherited the Hruby Rohozec estate.

2.2 At the end of the Second World War, on 6 August 1945, his estate was confiscated under Benes Decree 12/1945, pursuant to which the landed properties of German and Magyar private persons were confiscated without any compensation. However, on account of his proven loyalty to Czechoslovakia during the period of Nazi occupation, he retained his Czechoslovak citizenship, pursuant to paragraph 2 of Constitutional Decree 33/1945. Subsequently, after a Communist government came to power in 1948, he was forced to leave Czechoslovakia in 1949 for political and economic reasons. In 1991, after the "velvet revolution" of 1989, he again took up permanent residence in Prague. On 16 April 1991 the Czech Ministry of Interior informed him that he was still a Czech citizen. Nevertheless, Czech citizenship was again conferred on him by the Ministry on 20 August 1992, apparently after a document was found showing that he had lost his citizenship in 1949, when he left the country.

2.3 On 15 April 1992, Law 243/1992 came into force. The law provides for restitution of agricultural and forest property confiscated under Decree 12/1945. To be eligible for restitution, a claimant had to have Czech citizenship under Decree 33/1945 (or under Law 245/1948, 194/1949 or 34/1953), permanent residence in the Czech Republic, having been loyal to the Czechoslovak Republic during the period of German occupation, and to have Czech citizenship at the time of submitting a claim for restitution. The author filed a claim for restitution of the Hruby Rohozec estate within the prescribed time limit and on 24 November 1992 concluded a restitution contract with the then owners, which was approved by the Land Office on 10 March 1993 (PU-R 806/93). The appeal by the town of Turnov was rejected by the Central Land Office by decision 1391/93-50 of 30 July 1993. Consequently, on 29 September 1993 the author took possession of his lands.

2.4 The author alleges State interference with the judiciary and consistent pressure on administrative authorities and cites in substantiation from a letter dated 29 April 1993 by the then Czech Prime Minister Vaclav Klaus, addressed to party authorities in Semily and to the relevant Ministries, enclosing a legal opinion according to which the restitution of property confiscated before 25 February 1948 was "legal", but nevertheless "unacceptable". The author states that this political statement was subsequently used in court proceedings. The author further states that, because of increasing political pressure at the end of 1993 the Ministry of Interior reopened the issue of his citizenship. Furthermore, the former owners of the land were persuaded to withdraw their consent to the restitution to which they had previously agreed.

2.5 On 22 December 1994 the Public Prosecutor's Office in the Semily District filed an application with the District Court under paragraph 42 of Law 283/1993 to declare the Land Office's decision of 10 March 1993 null and void. On 29 December 1994, the District Court rejected this application. On appeal, the matter was referred back to the first instance.

2.6 On 7 August 1995, a "citizens' initiative" petitioned revision of the Semily Land Office's decision of 10 March 1993. On 17 October 1995, the Central Land Office examined the legality of the decision and rejected the request for revision. Nevertheless, on 2 November 1995 the author was informed by the Central Land Office that it would, after all, begin to revise the decision. On 23 November 1995, the Minister of Agriculture annulled the Semily Land Office decision of 10 March 1993, purportedly because of doubts as to whether the author fulfilled the requirement of permanent residence, and referred the matter back. On 22 January 1996, the author applied to the High Court in Prague against the Minister's decision.

2.7 On 9 February 1996, Law 243/1992 was amended. The condition of permanent residence was removed (following the judgement of the Constitutional Court of 12 December 1995, holding the residence requirement to be unconstitutional), but a new condition was added, of uninterrupted Czechoslovak/Czech citizenship from the end of the war until 1 January 1990. The author claims that this law specifically targeted him and submits evidence of the use of the term "Lex Walderode" by the Czech media and public authorities. On 3 March 1996 the Semily Land Office applied the amended Law to his case to invalidate the restitution agreement of 24 November 1992, since Dr. Des Fours did not fulfil the new eligibility requirement of continuous citizenship. On 4 April 1996, the author lodged an appeal with the Prague City Court against the Land Office's decision.

2.8 As regards the exhaustion of domestic remedies, the late author contended that the proceedings were being deliberately drawn out because of his age and, moreover, that the negative outcome was predictable. He therefore requested the Committee to consider his communication admissible, because of the delay in the proceedings and the unlikelihood of the effectiveness of domestic remedies.

The complaint

3.1 The late author and his surviving spouse claim that the restitution of the property in question was annulled for political and economic reasons and the legislation was amended to exclude him from the possibility of obtaining redress for the confiscation of his property. It is claimed that this constitutes a violation of article 26 of the Covenant, as well as of article 14, paragraph 1, because of political interference with the legal process (such as the Minister's decision of 23 November 1995). In this context, the author also refers to the long delays in the hearing of his case.

3.2 Further, he claims that the requirement of continuous citizenship for the restitution of property is in violation of article 26 of the Covenant and refers to the Committee's jurisprudence on this point. The author also claims that the restitution conditions applying to him are discriminatory in comparison with those applying to post-1948 confiscations.

The State party's observations

4.1 By submission of 13 June 1997, the State party noted that the author appealed to the Prague City Court from the decision of the District Land Office in Semily of 8 March 1996. As of June 1997, the proceedings were not completed, since the Land Office could not send the files concerning the case to the City Court, since these were still with the High Court.

4.2 Considering that the author commenced proceedings in the High Court in January 1996 against the decision of the Minister of Agriculture to annul the restitution, and that by December 1996, the preparatory stage of obtaining all necessary documentary evidence was completed, the State party argued that no undue prolongation had occurred.

4.3 The State party indicated that remedies exist when the author feels that the proceedings are being intentionally delayed. The author could have complained to the Chairman of the court, from where a possibility of review with the Ministry of Justice exists. Another remedy available to the author is a constitutional complaint, which may be accepted even if he has not exhausted domestic remedies if the application of remedies is unduly delayed and he has suffered serious harm as a result.

4.4 According to the State party, the rights invoked by the author are rights that can be asserted through a constitutional complaint, since international treaties regarding human rights are directly applicable and superior to law.

4.5 The State party rejects the author's suggestion that any attempts to assert his rights through the courts is useless because of the political interference with the judicial process. As regards the Prime Minister's letter concerning the interpretation of Law No. 243/1992, the State party denies that this letter was a political instruction for the courts. It notes that the letter was not addressed to a court and that it was merely a reply to an information request from the chairman of the local branch of his party and the contents were general in nature. If the author nevertheless fears that the letter may affect the impartiality of the court, he may ask the Constitutional Court to order that the letter should be removed from the court file on the ground of interference by a public authority with the exercise of his right to a fair hearing.

4.6 The State party submits that difference in treatment between the Restitution Law No. 243/1992 and the laws applying to the post-1948 confiscations does not constitute discrimination, as the two sets of laws serve different purposes and cannot be compared.

4.7 The State party concluded that the author has failed to exhaust domestic remedies and that the communication is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. The State party also submits that since the author's allegations are not substantiated and/or do not disclose an appearance of a violation of any of the rights set forth in the Covenant, the communication is inadmissible ratione materiae.

The author's comments

5.1 In his comments, the author refers to his original communication and submits that the State party has basically failed to contradict any of his claims.

5.2 He emphasizes that he retained his Czech citizenship under Benes Decree No. 33/1945, and that thus all the requirements of the original Law 243/1992 had been fulfilled when the Land Office approved the return of his property. The author notes that the State party remains silent about amendment 30/1996, introducing a further condition of continuous Czech citizenship, which did not apply when his restitution contract was approved in 1993. According to the author, this amendment made it possible to expropriate him again.

5.3 According to the author, the application of further domestic remedies would be futile because of the political interests in his case. He moreover points to the delays in the handling of the case, whether intentional or not.

5.4 The author dismisses the State party's attempt to explain away the Minister's letter as a simple expression of opinion and maintains that the opinion of the Prime Minister was equated with an interpretation of the law, and submits that the political dimension of his restitution procedure is evident from the interaction of several components.

5.5 With regard to the petition received by the Ministry of Agriculture from local residents, the author points out that the decision of the Semily Land Office was handed down on 10 March 1993 and the petition against it was submitted on 7 August 1995, two years and five months later. The Minister of Agriculture's order quashing the Semily Land Office's earlier decision followed on 23 November 1995, three and half months after the petition. It becomes evident that the 30-day time limit stipulated in Law 85/1990 concerning the right of petition was not observed.

5.6 In a further submission, the author states that his complaint against the Minister's decision of 23 November 1995 was rejected by the High Court on 25 August 1997. The author claims that the reasons given by the court again illustrate the political nature of the process.

5.7 On 25 March 1998, the Prague City Court rejected the author's appeal against the refusal of the restitution of his property by the Land Office in 1996, since he no longer fulfilled the requirements added to the law in amendment 30/1996. On 24 July 1998, the author filed a complaint against this decision with the Czech Constitutional Court.

5.8 The author further submits that even if the Constitutional Court would find in his favour, the decision would again be referred to the first instance (the Land Office), thus entailing considerable further delay and opening the door for more political intervention. According to the author, the whole procedure could easily take another five years. He considers this to be unjustifiably long, also in view of his age.

5.9 In this context, the author recalls the salient aspects of his case. The restitution contract which he concluded was approved by the Land Office on 10 March 1993, and the appeal against the approval was rejected by the Central Land Office on 30 July 1993, after which the restitution was effected in accordance with Law 243/1992. Only on 25 November 1995, that is more than two years after he had taken possession of his lands, did the Minister of Agriculture quash the Land Office's decision, on the ground that the Office had not sufficiently verified whether the author complied with the requirement of permanent residence. It appears from the Court judgements in the case, that at the time of the Minister's decision, it was expected that the Constitutional Court would declare this residence requirement unconstitutional (it subsequently did so, on 12 December 1995, less than a month after the Minister's decision). After a requirement of continued citizenship was added to Law 243/1992 by law 30/1996 of 9 February 1996, the Land Office then reviewed the legality of the restitution agreement in the author's case, and applying the new law declared the agreement invalid on 3 March 1996. The two court proceedings which the author then initiated, were delayed, as acknowledged by the State party, in one case because the Ministry was not in a position to furnish the papers needed by the Court, and in the other because of a backlog at the court in handling cases.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 During its sixty-fifth session in March 1999, the Committee considered the admissibility of the communication. It noted the State party's objection to the admissibility of the communication on the ground that the author had failed to exhaust all domestic remedies available to him. The Committee noted, however, that in August 1997, the High Court rejected the author's complaint against the Minister's decision, and on 25 March 1998, the City Court in Prague rejected his appeal against the Land Office's decision of 1996. The text of these decisions shows that no further appeal is possible. The effect is to preclude any further attempt by the author to validate and seek approval of the restitution agreement of 1992.

6.3 The author has since filed a constitutional complaint against the Prague City Court decision that the requirement of continued citizenship is legitimate. The Committee noted that in the instant case, the Constitutional Court had already examined the constitutionality of Law 243/1992. In the opinion of the Committee and having regard to the history of this case, a constitutional motion in the author's case would not offer him a reasonable chance of obtaining effective redress and therefore would not constitute an effective remedy which the author would have to exhaust for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 In this context, the Committee also took note of the author's arguments that even if he were to win a constitutional appeal, the case would then be referred back, and the proceedings could take another five years to become finalized. In the circumstances, taking into account the delays which had already been incurred in the proceedings and which were attributable to the State party, the delays which would likely occur in future and the author's advanced age, the Committee also found that the application of domestic remedies had been unreasonably prolonged.

7. On 19 March 1999, the Committee held that the communication was admissible insofar as it might raise issues under articles 14, paragraph 1, and 26 of the Covenant.

Consideration of the merits

8.1 Pursuant to article 5, paragraph 1, of the Optional Protocol, the Committee proceeds to an examination of the merits, in the light of the information submitted by the parties. It notes that it has received sufficient information from the late author and his surviving spouse, and that no further information on the merits has been received from the State party subsequent to the transmittal of the Committee's admissibility decision, notwithstanding two reminders. The Committee recalls that a State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted.

8.2 The Committee has noted the author's claims that the State party has violated article 14, paragraph 1, of the Covenant because of alleged interference by the executive and legislative branches of government in the judicial process, in particular through the letter of the Prime Minister dated 29 April 1993, and because of the adoption of retroactive legislation aimed at depriving the author of rights already acquired by virtue of prior Czech legislation and decisions of the Semily Land Office. With regard to the adoption of retroactive legislation, the Committee observes that, whereas an allegation of arbitrariness and a consequent violation of article 26 is made in this respect, it is not clear how the enactment of law 30/1996 raises an issue under article 14, paragraph 1. As to the Prime Minister's letter, the Committee notes that it was part of the administrative file in respect of the author's property which was produced in Court, and that there is no indication whether and how this letter was actually used in the court proceedings. In the absence of any further information, the Committee takes the view that the mere existence of the letter in the case file is not sufficient to sustain a finding of a violation of article 14, paragraph 1, of the Covenant.

8.3 With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee begins by noting that Law No. 243/1992 already contained a requirement of citizenship as one of the conditions for restitution of property and that the amending Law No. 30/1996 retroactively added a more stringent requirement of continued citizenship. The Committee notes further that the amending Law disqualified the author and any others in this situation, who might otherwise have qualified for restitution. This raises an issue of arbitrariness and, consequently, of a breach of the right to equality before the law, equal protection of the law and non-discrimination under article 26 of the Covenant.

8.4 The Committee recalls its Views in cases No. 516/1993 (Simunek et al.), 586/1994 (Joseph Adam) and 857/1999 (Blazek et al.) that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior State confiscations, and constitutes a violation of article 26 of the Covenant. This violation is further exacerbated by the retroactive operation of the impugned Law.

9.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that article 26, in conjunction with article 2 of the Covenant, has been violated by the State party.

9.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the late author's surviving spouse, Dr. Johanna Kammerlander, with an effective remedy, entailing in this case prompt restitution of the property in question or compensation therefore, and, in addition, appropriate compensation in respect of the fact that the author and his surviving spouse have been deprived of the enjoyment of their property since its restitution was revoked in 1995. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

9.3 The Committee recalls that the Czech Republic, by becoming a State party to the Optional Protocol, recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Furthermore, the Committee urges the State party to put in place procedures to deal with Views under the Optional Protocol.

9.4 In this connection, the Committee wishes to receive from the State party, within 90 days following the transmittal of these Views to the State party, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the new Czech Republic notified its succession to the Covenant and the Optional Protocol.

L. Communication No. 763/1997, Lantsova v. Russia (Views adopted on 26 March 2002, seventy-fourth session)*

Submitted by:	Ms. Yekaterina Pavlovna Lantsova (represented by Ms. Karina Moskalenko, International Protection Center)
Alleged victim:	The author's son Mr. Vladimir Albertovich Lantsov, deceased
State party:	The Russian Federation

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2002,

Having concluded its consideration of Communication No. 763/1997, submitted to the Human Rights Committee by Ms. Yekaterina Pavlovna Lantsova, mother of Mr. Vladimir Albertovich Lantsov, deceased, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Yekaterina Pavlovna Lantsova, mother of Vladimir Albertovich Lantsov, deceased. Mrs. Lantsova claims that her son, who was born on 27 June 1969, was a victim of violations by Russia of article 6, paragraph 1, article 7 and article 10, paragraph 1 of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts as presented by the author

2.1 In August 1994, Mr. Lantsov, during an argument, inflicted injuries on another person, as a consequence of which both criminal and civil charges were pressed against him. On 1 March 1995, he made full reparation to the plaintiff for damages determined in the civil case. Awaiting his criminal trial, set for 13 April 1995, Mr. Lantsov was initially released.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

However, on 5 March 1995, after failing to appear for a meeting with the investigator, he was placed in pre-trial detention at Moscow's pre-trial detention centre, "Matrosskaya Tishina", where he died on 6 April 1995, at the age of 25.

2.2 Mrs. Lantsova submits that her son was healthy when he first entered Matrosskaya Tishina, but that he fell ill due to the very poor conditions at the prison. She complains that her son was given no medical treatment despite repeated requests. Finally, she complains that the Russian Federation has failed to bring those responsible to justice.[1]

2.3 The author submits that the conditions at Moscow's pre-trial detention centres are inhuman, in particular because of extreme overcrowding, poor ventilation, inadequate food and appalling hygiene. She refers to the 1994 report of the Special Rapporteur against torture to the Commission on Human Rights.[2] Regarding access to health care, the report states that overcrowding exacerbates the inability of the staff to provide food and health care, and notes the high incidence of disease in the centres.[3] Matrosskaya Tishina is held out for particular criticism in the report: "The conditions are cruel, inhuman and degrading; they are torturous."[4]

2.4 According to Mrs. Lantsova, based on statements from other detainees in the cell with her son, shortly after he was brought to Matrosskaya Tishina his physical and mental state began to deteriorate. He began to lose weight and developed a temperature. He was coughing and gasping for breath. Several days before his death he stopped eating and drank only cold water. He became delirious at some point and eventually lost consciousness.

2.5 It appears that other detainees requested medical assistance for Mr. Lantsov some time after the first week of his detention, that a medical doctor attended to him once or twice in the cell and that he was given aspirin for his temperature. However, between 3 and 6 April, during what was a rapid and obvious deterioration in his condition, he received no medical attention, despite repeated requests for assistance by the other detainees. On 6 April, after the other detainees cried out for assistance, medical personnel arrived with a stretcher. Mr. Lantsov died later that day in the prison clinic. His death certificate identifies the cause of death as "acute cardiac/circulatory insufficiency, intoxication, cachexia of unknown etiology."

2.6 With regard to the exhaustion of domestic remedies the author states that decision to open a criminal investigation into Mr. Lantsov's death is within the competence of the chief of the pre-trial detention centre. A final decision on the matter lies with the procurator's office. Mrs. Lantsov has made timely and repeated applications for a criminal investigation to be opened, but these were consistently denied. She therefore concludes that she has exhausted domestic remedies.

2.7 The procurator's decisions refusing to open a criminal investigation are based on the conclusion that the death in this case resulted from a combination of pneumonia and the stressful conditions of confinement, and that under these circumstances it would be impossible to find the detention centre personnel liable.

The complaint

3. Mrs. Lantsova claims that the Russian Federation violated her son's fundamental human rights by causing his death as a result of confinement under conditions unfit for human survival, and that it also failed in its obligation to provide any meaningful legal protection against such violations. In her opinion, this constitutes violations of articles 6, paragraph 1, article 7 and article 10, paragraph 1 of the Covenant.

Decision on admissibility

4. By a note dated 23 March 1998, the State party informed the Committee that it did not object to the admissibility of the communication.

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as required under article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 The Committee therefore decided, on 7 July 1998 at its sixty-third session, that the communication was admissible insofar as it may raise issues under article 6, paragraph 1, article 7 and article 10, paragraph 1 of the Covenant.

The State party's observations on the merits of the communication

6.1 In its observations on the merits of the communication, dated 28 December 1998, the State party states that Mr. Lantsov was arrested on 5 March 1995 and that on 7 March 1995 he was moved to a pre-trial detention centre and placed in a communal cell. On being admitted to the detention centre he underwent medical examinations, in accordance with the established procedure. At that time he expressed no complaints about his health, no physical anomaly was noted and a fluoroscopic examination of the chest showed no pathological condition. On 6 April 1995, at about 9 a.m., Mr. Lantsov's fellow detainees informed the guards that he was not feeling well. After an examination by the duty doctor, Mr. Lantsov was urgently admitted to the hospital attached to the detention centre, but despite these measures he died at 9.15 a.m. A commission composed of doctors from the preventive medicine institutions attached to the Ministry of the Interior and the Moscow Department of Health carried out an investigation into Mr. Lantsov's death. Its conclusions were that the cause of death had been bilateral ulcerative pneumococcic pneumonia, bilateral pleurisy and focal atelectasis leading to respiratory-cardiovascular failure. The general inflammation of the lungs and the pleural cavity, the patient's failure to seek medical assistance and conditions in the prison had, in the State party's opinion, contributed to the rapid fatal outcome.

6.2 The State party admits that at the time when Mr. Lantsov was detained, the detention centres (sledstvenii izoliator) held more than twice as many detainees as their design capacity, with the result that conditions of detention were not consistent with the regulations in force. The commission of inquiry concluded that there had been no medical error. The diagnosis of the causes of death had been confirmed in the post-mortem report prepared on 13 May 1995.

6.3 In the absence of an offence, the Office of the Interregional Procurator for Moscow-Preobrajenskaya, the public prosecution department, did not initiate criminal proceedings. This decision was subsequently confirmed by the Moscow Procurator's Office. During the review of the case it was established that the family had not been notified of the death promptly and that the officer concerned had been held accountable.

6.4 The State party admits that, generally speaking, conditions in detention centres constitute a serious problem for Russia and that there is no prospect of an immediate solution. A set of measures to reform the prison system has been established, with a view to improving conditions in the detention centres and bringing them into line with international standards for the treatment of prisoners. The State party cites two presidential edicts and a government decree as examples of recent steps towards the transfer of responsibility for prison establishments from the Ministry of the Interior to the Ministry of Justice. An increase in the number of places in detention centres and prisons was under way, but was being impeded by financial difficulties.

Author's comments on the State party's observations concerning the merits of the case

7.1 In her comments dated 21 December 2000, the author notes that the State party admits the most important facts of the case. Mr. Lantsov had entered the detention centre in perfect health, but conditions there caused his death.

7.2 She draws attention to the fact that he had only been given 15 minutes' medical attention before his death. Although the doctors had been informed some days before his death of his deteriorating state of health and the risk of death, they took no action. According to the author, such is common practice in that prison. With regard to the State party's failure to properly investigate, the author recalls the testimony of various prisoners on this point and states that the prosecution department could have collected incriminatory statements if it had conducted a genuine inquiry by hearing testimony from Mr. Lantsov's fellow prisoners. For some reason, the prosecution department did not make a proper inquiry.[5]

7.3 The author also rejects the State party's observation that the detention centres contained only twice as many prisoners as they were designed for. The testimony showed that overcrowding in the centres was five times the indicated level and that detainees had to sleep in turn because of lack of beds.

7.4 As regards the late notification of death to the family, the author states that in fact the authorities had never tried to notify anyone. Without Mr. Lantsov's lawyer, who had tried to visit him, no one could be certain whether or when his mother would have learnt the truth about his death.

7.5 Lastly, the author considers that the State party is trying to evade its responsibility by listing various future decrees which are intended to improve the situation in prisons. This, in her view, constitutes nothing less than acceptance by the State party of the inhuman standards in prisons. In any event, these decrees were adopted two years after her son's death; current or future acts can change nothing, or cannot in any way change the fact that the Russian Federation violated the human rights of a 25-year-old man in good health and that those violations cost him his life.

Issues and proceedings before the Committee

8.1 The Human Rights Committee has considered this communication, taking account of all the written information submitted to it by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee must determine whether the State party violated articles 6, paragraph 1, article 7 and 10, paragraph 1 of the Covenant in connection with the death of the author's son.

9.1 Regarding the conditions of detention, the Committee notes that the State party concedes that prison conditions were bad and that detention centres at the time of the events held twice the intended number of inmates. The Committee also notes the specific information received from the author, in particular that the prison population was, in fact, five times the allowed capacity and that the conditions in Matrosskaya Tishina prison were inhuman, because of poor ventilation, inadequate food and hygiene. The Committee finds that holding the author's son in the conditions prevailing at this prison during that time entailed a violation of his rights under article 10, paragraph 1 of the Covenant.

9.2 Concerning the death of Mr. Lantsov, the Committee notes the author's allegations, on the strength of testimony by several fellow detainees, that after the deterioration of the health of the author's son, he received medical care only during the last few minutes of his life, that the prison authorities had refused such care during the preceding days and that this situation caused his death. It also takes note of the information provided by the State party, namely that several inquiries were carried out into the causes of the death, i.e. acute pneumonia leading to cardiac insufficiency, and that Mr. Lantsov had not requested medical assistance. The Committee affirms that it is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection. The stated intention of the State party to improve conditions has no impact in the assessment of this case. The Committee notes that the State party has not refuted the causal link between the conditions of the detention of Mr. Lantsov and the fatal deterioration of his state of health. Further, even if the Committee starts from the assertion of the State party that neither Mr. Lantsov himself nor his co-detainees had requested medical help in time, the essential fact remains that the State party by arresting and detaining individuals takes the responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected. Lack of financial means cannot reduce this responsibility. The Committee considers that a properly functioning medical service within the detention centre could and should have known about the dangerous change in the state of health of Mr. Lantsov. It considers that the State party failed to take appropriate measures to protect Mr. Lantsov's life during the period he spent in the detention centre. Consequently, the Human Rights Committee concludes that, in this case, there has been a violation of paragraph 1 of article 6 of the Covenant.

9.3 In the light of the above findings of violations of article 6 and article 10 of the Covenant, the Committee does not consider it necessary to pronounce itself on a violation of article 7.

10. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party failed in its obligation to ensure the protection of Mr. Lantsov, who lost his life as a direct result of the existing prison conditions. The Committee finds that articles 6, paragraph 1, and article 10, paragraph 1 of the Covenant were violated.

11. The Committee is of the view that Mrs. Lantsova is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy. The State party should take effective measures: (a) to grant appropriate compensation (b) to order an official inquiry into the death of Mr. Lantsov; and (c) to ensure that similar violations do not recur in the future, especially by taking immediate steps to ensure that conditions of detention are compatible with the State party's obligation under articles 6 and 10 of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The communication also indicates that notification of Mr. Lantsov's death was not given to the family or to the local registry office until 11 April 1995, after Mr. Lantsov's lawyer had discovered the fact of his death while at the detention centre to meet with him. This matter was apparently examined by the chief of the pre-trial detention centre (according to the letter of 10 July 1995 from the deputy city procurator, provided with the communication), but the results of this investigation are unknown.

[2] Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1994/37 (E/CN.4/1995/34/Add.1).

[3] Ibid., para. 41.

[4] Ibid., para. 71.

[5] The author invokes the testimony of Mr. Igor Cripenevitch, who stated that Mr. Lantsov had been seriously ill during the last week and that during the last three days, when he had been critically ill, the authorities had refused to help him. The file contains copies of the refusals of the prosecution department to initiate criminal proceedings against the detention centre, and states that Mr. Lantsov's fellow prisoners had been questioned but that their testimony had been contradictory: some had stated that in the two or three days before the death doctors had examined Mr. Lantsov, while others had denied that (reply of the Interregional Procurator for Preobrajenskaya Prokuratura of 9 April 1996, exhibit No. 7).

M. Communication No. 765/1997, Fábryová v. The Czech Republic (Views adopted on 30 October 2001, seventy-third session)*

Submitted by:	Ms. Eliska Fábryová
Alleged victim:	The author
State party:	The Czech Republic
Date of communication:	28 May 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2001,

Having concluded its consideration of Communication No. 765/1997, submitted to the Human Rights Committee by Eliska Fábryová under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Eliska Fábryová, née Fischmann, a Czech citizen, born on 6 May 1916. The author claims to be a victim of discrimination by the Czech Republic. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Ivan Shearer and Mr. Maxwell Yalden.

The text of a dissenting individual opinion signed by Committee member Ms. Christine Chanet is appended to the present document.

The facts as submitted by the author

2.1 The author's father Richard Fischmann owned an estate in Puklice in the district of Jihlava, Czechoslovakia. In 1930, at a national census, he and his family registered as Jews. In 1939, after the occupation by the Nazis, the estate was "aryanised"[1] and a German sequestrator was appointed. Richard Fischmann died in 1942 in Auschwitz. The author is not represented by counsel.

2.2 The rest of the family was interned in concentration camps and only the author and her brother Viteslav returned. In 1945, the estate of Richard Fischmann was confiscated under Benes decree 12/1945 because the district committee decided that he was German as well as a traitor to the Czech Republic,[2] the assumption that he was German being based on the assertion that he had lived "in a German way".

2.3 The author's appeal against the confiscation was dismissed. The decision of the district committee was upheld by a judgement of the highest administrative court in Bratislava on 3 December 1951.

2.4 After the end of communist rule in Czechoslovakia, the author lodged a complaint to the General Procurator, on 18 December 1990, for denial of justice with regard to her claim for restitution. Her complaint was dismissed on 21 August 1991 for being out of time, having been lodged more than five years after the confiscation. The author states that under Communist rule it was not possible to lodge a complaint within the time limit of five years as prescribed by law.

2.5 The author states that on 17 June 1992 she applied for restitution according to the law No. 243/1992.[3] Her application was dismissed on 14 October 1994 by the Land Office of Jihlava.

The complaint

3. The author claims to be a victim of discrimination as under the law No. 243/1992 she is not entitled to restitution of her father's property.

State party's observations

4.1 By submission of 20 October 1997, the State party stated that the author's application for restitution of her father's property was dismissed by the Jihlava Land Office on 14 October 1994, on grounds of non-compliance with the legal requirements. It explained that the confiscated property of persons who were deprived of Czechoslovak citizenship under the Benes decrees in 1945, may be restituted in cases where the claimant has his citizenship renewed through the procedures set by law. However, the law did not expressly address the situation of persons who never lost their citizenship and whose property was confiscated in violation of the laws operative at that time. Since the author's father never lost his Czechoslovak citizenship, he could not be considered to be an entitled person and the property could not be restored.

4.2 The State party further explained that the author's appeal was dismissed for being filed out of time. The author's lawyer then raised the objection that the Land Office's decision had not been served properly, since it had not been served to the lawyer directly, but to a member of his staff, who was not authorized to receive it. The Land Office accepted the objection, and served the decision again. The author subsequently appealed against the decision. The City Court dismissed the appeal by a ruling dated 6 August 1996, on the ground that the decision had been properly served the first time and should not have been served a second time. On 11 October 1996, the author filed a constitutional complaint, which was dismissed by the Constitutional Court as inadmissible ratione temporis.

4.3 On the basis of all the reasons given, the State party argued that the author's communication was inadmissible for non-exhaustion of domestic remedies since she missed the deadlines for the appeals.

4.4 The State party further submitted that, since the present communication had been submitted to the Committee, the Constitutional Court had decided, in cases similar to that of the author's father, that applicants who never lost their citizenship were also entitled to restitution under law No. 243/1992. As a consequence, the Central Land Office, which examined the author's file, decided that the Land Office's decision in the author's case should be reviewed, since it was inconsistent with the Constitutional Court's ruling. On 27 August 1997, the Central Land Office initiated administrative proceedings and on 9 October 1997, it quashed the Land Office's decision of 14 October 1994, and decided that the author should restart her application for restitution ab initio. Normal appeal possibilities would be open to the author if she was not satisfied with the outcome of the proceedings. Also for this reason, the State party argued that the communication was inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

The author's comments

5.1 By a letter of 21 January 1998, the author rejected the State party's argument that her communication was inadmissible, since she had already appealed up to the Constitutional Court and no further appeal was available. However, the author confirmed that after her communication was registered for consideration by the Human Rights Committee, new proceedings were ordered.

5.2 In a further submission, the author forwarded a copy of a letter by the Ministry for Agriculture, dated 25 May 1998, in which she was informed that the decision of the Central Land Office of 9 October 1997 to quash the decision of the Land Office of 14 October 1994 had been served to other interested parties after the expiration term of three years of the latter decision, and that it therefore did not attain legal force.

5.3 The author claimed that the pattern of arbitrariness in her case constitutes a flagrant violation of human rights in denying her a remedy for the abuses committed against her and her family in the past.

Additional comments by the State party on the admissibility

6. No further observations were received from the State party, although the author's comments had been transmitted to it.

Decision on admissibility

7. At its sixty-sixth session, on 9 July 1999, the Committee considered the admissibility of the communication. Having ascertained, pursuant to article 5, paragraph 2 of the Optional Protocol, that the author had exhausted all available domestic remedies and that the same matter was not being examined under another procedure of international investigation or settlement, the Committee also noted that the State party reopened the author's case by a decision of the Central Land Office of 9 October 1997 and that, as a result of errors apparently committed by the State party's authorities, the decision to quash the original decision of the Land Office had never come into effect. In the circumstances, the Committee declared the communication admissible.

Observations by the parties on the merits

8.1 Despite having been invited to do so by the decision of the Committee of 9 July 1999 and by a reminder of 19 September 2000, the State party has not submitted any observations or comments on the merits of the case.

8.2 By letters of 25 January 2000, 29 August 2000 and 25 June 2001, the author brought to the attention of the Committee that despite the adoption by the State party's Parliament of new legislative measures governing the restitution of property confiscated as a result of the Holocaust (Act No. 212/2000), the authorities had not been willing to apply such a legislation and have never compensated her.

8.3 Despite having been transmitted the above information by a letter of 24 July 2001, the State party has not made any additional comments.

Issues and proceeding before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol. Moreover, in the absence of any submission from the State party following the Committee's decision on admissibility, the Committee relies on the detailed submissions made by the author so far as they raise issues concerning Law No. 243/1992 as amended. The Committee recalls in this respect that a State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted. The complaint of the author raises issues under article 26 of the Covenant.

9.2 The Committee notes that the State party concedes that under Law No. 243/1992 individuals in a similar situation as that of the author qualify for restitution as a result of the subsequent interpretation given by the Constitutional Court (para. 4.4). The State party further concedes that the decision of the Jihlava Land Office of 14 October 1994 was wrong and that the author should have had the opportunity to enter a fresh application before the Jihlava Land Office. The author's renewed attempt to obtain redress has, however, been frustrated by the State party itself which, through a letter of the Ministry of Agriculture of 25 May 1998, informed the author that the decision of the Jihlava Land Office of 14 October 1994 had become final on the ground that the decision of the Central Land Office reversing the decision of the Jihlava Land Office had been served out of time.

9.3 Given the above facts, the Committee concludes that, if the service of the decision of the Central Land Office reversing the decision of the Jihlava Land Office was made out of time, this was attributable to the administrative fault of the authorities. The result is that the author was deprived of treatment equal to that of persons having similar entitlement to the restitution of their previously confiscated property, in violation of her rights under article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the facts before it disclose a violation of article 26 of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

12. The Committee recalls that the Czech Republic, by becoming a State party to the Optional Protocol, recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established.

13. The Committee wishes to receive from the State party, within 90 days following the transmittal of these Views to the State party, information about the measures taken to give effect to the Views.

[Adopted in English, French and Spanish, the English being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] I.e. that the property was taken away from Jews as "non-Aryans" and transferred to the German State or German natural or juridical persons.

[2] The author states that according to the edict No. A 4600 9/11 45 VI/2 of the Ministry of the Interior of 13 November 1945 the district committees had the competence to examine the reliability of those persons who in 1930 had registered as Jews.

[3] Law No. 243/1992 provides for the restitution of property which was confiscated as a result of Benes decrees Nos. 12/1945 and 108/1945. One of the conditions to be eligible for restitution is that the claimant must have been granted Czech citizenship by decree 33/1945, Act No. 245/1948, 194/1949 or 34/1953.

APPENDIX

Individual opinion of Committee member Ms. Christine Chanet (dissenting)

The State party did not consider it necessary to provide any explanation as to the substance of the case since, in its view, domestic remedies had not been exhausted.

In paragraphs 10.2 and 10.3 of its decision, the Committee finds a violation of the Covenant in administrative decisions, but fails to take into account the State party's observations, in which the State party maintained that those decisions could be contested through the remedy of the courts and that the author of the communication had sought to avail herself of that remedy but had done so out of time.

Accordingly, this communication ought, in my opinion, to have been considered inadmissible.

(Signed) Christine Chanet

[Done in English and French, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

N. Communication No. 774/1997, Brok v. The Czech Republic (Views adopted on 31 October 2001, seventy-third session)*

Submitted by:	Mr. Robert Brok (deceased) and his surviving spouse Dagmar Brokova
Alleged victims:	The author and his surviving spouse Dagmar Brokova
State party:	The Czech Republic
Date of communication:	23 December 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2001,

Having concluded its consideration of Communication No. 774/1997, submitted to the Human Rights Committee by Mr. Robert Brok (deceased) and by his surviving spouse Dagmar Brokova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The original author of the communication dated 23 December 1996, Robert Brok, was a Czech citizen, born in September 1916. When he passed away on 17 September 1997, his wife Dagmar Brokova maintained his communication. It is claimed that the Czech Republic has violated articles 6, 9, 14 (1), 26 and 27 of the Covenant. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.[1] The author is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

The facts as submitted

2.1 Robert Brok's parents owned a house in the centre of Prague since 1927 (hereinafter called the property). During 1940 and 1941, the German authorities confiscated their property with retroactive effect to 16 March 1939, because the owners were Jewish. The property was then sold to the company Matador on 7 January 1942. The author himself, was deported by the Nazis, and returned to Prague on 16 May 1945, after having been released from a concentration camp. He was subsequently hospitalized until October 1945.

2.2 After the end of the war, on 19 May 1945, President Benes' Decree No. 5/1945, followed up later by Act 128/1946, declared null and void all property transactions effected under pressure of the occupation regime on the basis of racial or political persecution. National administration was imposed on all enemy assets. This included the author's parents' property pursuant to a decision taken by the Ministry of Industry on 2 August 1945. However, in February 1946, the Ministry of Industry annulled that decision. It also annulled the prior property confiscation and transfers, and the author's parents were reinstated as the rightful owners, in accordance with Benes Decree No. 5/1945.

2.3 However, the company Matador, which had been nationalized on 27 October 1945, appealed against this decision. On 7 August 1946, the Land Court in Prague annulled the return of the property to the author's parents and declared Matador to be the rightful owner. On 31 January 1947, the Supreme Court confirmed this decision. The Court found that since the company with all its possessions had been nationalized in accordance with Benes Decree No. 100/1945 of 24 October 1945, and since national property was excluded from the application of Benes Decree No. 5/1945, the Ministry had wrongfully restored the author's parents as the rightful owners. The property thereby stayed in possession of Matador, and was later, in 1954, transferred to the State company Technomat.

2.4 Following the change to a democratic government at the adoption of restitution legislation, the author applied for restitution under Act No. 87/1991 as amended by Act No. 116/1994. The said law provides restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime (25 February 1948-1 January 1990). The law also made provisions for restitution or compensation to victims of racial persecution during the Second World War, who have an entitlement by virtue of Decree No. 5/1945. The courts (District Court decision 26 C 49/95 of 20 November 1995 and Prague City Court decision 13 Co 34/94-29 of 28 February 1996), however, rejected the author's claim. The District Court states in its decision that the amended Act extends the right to restitution to persons who lost their property during the German occupation and who could not have their property restituted because of political persecution, or who went through legal procedures that violated their human rights subsequent to 25 February 1948, on condition that they comply with the terms set forth in Act No. 87/1991. However, the court was of the opinion that the author was not eligible for restitution, because the property was nationalized before 25 February 1948, the retroactive cut-off date for claims under Act No. 87/1991 section 1, paragraph 1, and section 6. This decision was confirmed by the Prague City Court.

2.5 Pursuant to section 72 of Act No. 182/1993, the author filed a complaint before the Constitutional Court that his right to property had been violated. This provision allows an individual to file a complaint to the Constitutional Court if the public authority has violated the claimant's fundamental rights guaranteed by a constitutional law or by an international treaty in particular the right to property.

2.6 The Constitutional Court concluded that since the first and second instances had decided that the author was not the owner of the property, there were no property rights that could have been violated. In its decision, the Constitutional Court invoked the question of fair trial on its own motion and concluded that "*the legal proceedings were conducted correctly and all the legal regulations have been safeguarded*". Accordingly, the Constitutional Court rejected the author's constitutional complaint on 12 September 1996.

The complaint

3.1 The author alleges that the court decisions in this case are vitiated by discrimination and that the courts' negative interpretation of the facts is manifestly arbitrary and contrary to the law.

3.2 The author's widow contends that the Act No. 87/1991, amended by Act No. 116/1994, is not applied to all Czech citizens equally. She deems it obvious that Robert Brok met all the conditions for restitution set forth in the law, but contends that the Czech courts were not willing to apply these same criteria to his case, in violation of articles 14, paragraph 1 and 26 of the Covenant.

3.3 The author's widow contends that the decision by the Supreme Court in 1947 was contrary to the law, in particular Benes Decree No. 5/1945 and Act No. 128/1946, which annul all property transfers after 29 September 1938 taken for reasons of national, racial or political persecution. She points out that at the time that Benes Decree No. 5/1945 was issued (10 May 1945), the company Matador had not yet been nationalized and that the exclusion of restitution therefore did not apply.

3.4 The author's widow states that the Act No. 87/1991 amended by Act No. 116/1994 section 3, paragraph 2 contains an exception to the time limitations and enables the author as entitled through Benes Decree No. 5/1945 to claim restitution. According to the author's widow, the intention of this exception is to allow restitution of property that was confiscated before 25 February 1948 owing to racial persecution, and especially to allow restitution of Jewish property.

3.5 The author's widow further claims that since the initial expropriations happened as part of genocide, the property should be restored regardless of the positive law in the Czech Republic. The author points to other European countries where confiscated Jewish properties are restituted to the rightful owners or to Jewish organizations if the owners could not be identified. Article 6 of the Covenant refers to obligations that arise from genocide. In the authors' opinion, the provision should not be limited to obligations arising from complainants killed in genocide, but also to those, like Robert Brok, who survived genocide. The refusal to restitute property thereby constitutes violation of article 6, paragraph 3, of the Covenant.

3.6 The Czech Republic has, according to the author's widow, systematically refused to return Jewish properties. She claims that since the Nazi expropriation targeted the Jewish community as a whole, the Czech Republic's policy of non-restitution also affects the whole group. As a result and for the reason of lacking economical basis, the Jewish community has not had the same opportunity to maintain its cultural life as others, and the Czech Republic has thereby violated their right under article 27 of the Covenant.

Observations by the State party

4.1 By note verbale of 16 October 2000, the State party objects to the admissibility of the communication. The grounds for the State party's objections are the following:

(a) It argues that the author invoked only the right to own property in the domestic procedure, and not the rights covered by the Covenant. Thus, the vindication of domestic remedies for Covenant rights are not engaged;

(b) The State party points out that the events complained of occurred prior to the entry into force of the Optional Protocol for the Czech Republic, when the property was subject to confiscation in the 1940s, and the communication is therefore inadmissible ratione temporis; and

(c) The State party notes that the communication concerns the right to own property, which is not covered by the Covenant, and the communication is therefore inadmissible ratione materiae.

4.2 The State party contends that the author on 19 February 1946 obtained restitution of his property on the basis of the Industry Ministry Decision No. II/2-7540/46 and not on the basis of the National Committee decision as empowered by Decree No. 5/1945. It further states that the procedure chosen by the author was inconsistent with the special legislation governing exemptions from national administration. In addition, the author's father did not avail himself of Decree No. 108/1945 that regulated the confiscation of enemy assets and the establishment of National Restoration Funds. He thereby waived enlarged avenues for appeals against dismissal of claims for exemptions from national administration, to the Ministry of Interior.

4.3 Furthermore, the State party contends that the author in his claim to the courts in 1995/1996 did not complain about discrimination nor challenge the handling of the case by the courts in 1946 and 1947.

4.4 The State party points out that in Communication No. 670/1995 Schlosser v. The Czech Republic and in Communication No. 669/1995 Malik v. The Czech Republic, the Committee concluded that the said legislation applied in these cases was not prima facie discriminatory within the meaning of article 26 of the Covenant merely because it did not compensate victims of injustices committed in the period before the Communist regime.

4.5 The State party contends that all formal restoration of title according to Decree No. 5/1945 was completed before 25 February 1948, whereas the Act No. 87/1991 as amended only covers restitution of property that was confiscated between 25 February 1948 and 1 January 1990.

Author's comments to State party's submission

5.1 By letter of 29 January 2001, the author's widow contends that the State party has not addressed her arguments concerning the amendment to Act No. 87/1991 by Act No. 116/1994, which she considers crucial for the evaluation of the case.

5.2 She further states that the property would never have become subject to nationalization if it were not for the prior transfer of the assets to the German Reich which was on racial basis, and therefore the decisions allowing nationalization were discriminatory. The author's widow concedes that the communication concerns a property right, but explains that the core of the violation is the element of discrimination and the denial of equality in contravention of articles 6, 14, 26 and 27 of the Covenant.

5.3 The author's widow further contends that the claim complies with the ratione temporis condition, since the claim relates to the decisions made by the Czech courts in 1995 and 1996.

5.4 With regard to the State party's claim that the author's father could have claimed the property pursuant to Act No. 128/1946 until 31 December 1949, the author's widow contends that the author's father had good reason to fear political persecution from the Communist regime after 25 February 1948. Moreover, the violations of the Communist regime are not before the Committee, but rather the ratification and continuation of those violations by the arbitrary denial of redress following the adoption of restitution legislation in the 1990s. The author's submission was transmitted to the State party on 7 February 2001. The State party, however, has not responded to the author's comments.

Examination of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee has noted the State party's objections to the admissibility and the author's comments thereon. It considers that the State party's allegations that the author has not met the ratione temporis condition for admissibility, is not relevant to the case, viewing that the author specifically noted that his claim relates to the decisions of the Czech courts in 1995 and 1996.

6.4 With regard to the State party's objections ratione materiae, the Committee notes that the author's communication does not invoke a violation of the right to property as such, but claims that he is denied a remedy in a discriminatory manner.

6.5 Furthermore, to the State party's objections that the communication is inadmissible for non-exhaustion of domestic remedies, the Committee notes that the facts raised in the present communication have been brought before the domestic courts of the State party in the several applications filed by the author, and have been considered by the State party's highest judicial authority. However, the issues relating to articles 6, 9 and 27 appear not to have been raised before the domestic courts. The Committee considers that it is not precluded from considering the remaining claims in the communication by the requirement contained in article 5, paragraph 2 (b), of the Optional Protocol.

6.6 In its inadmissibility decisions on communications No. 669/1995 Malik v. The Czech Republic and 670/1995 Schlosser v. The Czech Republic, the Committee held that the author there had failed to substantiate, for purposes of admissibility, that Act No. 87/1991 was prima facie discriminatory within the meaning of article 26. The Committee observes that in this case the late author and his widow have made extensive submissions and arguments which are more fully substantiated, thus bringing the case over the threshold of admissibility so that the issues must be examined on the merits. Moreover, the instant case is distinguishable from the above cases in that the amendment of Act No. 87/1991 by Act No. 116/1994 provides for an extension for a claim of restitution for those entitled under Benes Decree No. 5/1945. The non-application of this extension to the author's case raises issues under article 26, which should be examined on the merits.

6.7 The Committee finds that the author has failed to substantiate for purposes of admissibility his claims under article 14, paragraph 1 of the Covenant. Thus, this part of the claim is inadmissible under article 2 of the Optional Protocol.

Examination of merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The question before the Committee is whether the application of Act No. 87/1991, as amended by Act No. 116/1994, to the author's case entails a violation of his right to equality before the law and to the equal protection of the law.

7.3 These laws provide restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime. The law also provides for restitution or compensation to victims of racial persecution during the Second World War who had an entitlement under Benes Decree No. 5/1945. The Committee observes that legislation must not discriminate among the victims of the prior confiscation to which it applies, since all victims are entitled to redress without arbitrary distinctions.

7.4 The Committee notes that Act No. 87/1991 as amended by Act No. 116/1994 gave rise to a restitution claim of the author which was denied on the ground that the nationalization that took place in 1946/47 on the basis of Benes Decree No. 100/1945 falls outside the scope of laws of 1991 and 1994. Thus, the author was excluded from the benefit of the restitution law although the Czech nationalization in 1946/47 could only be carried out because the author's property was confiscated by the Nazi authorities during the time of German occupation. In the Committee's view this discloses a discriminatory treatment of the author, compared to those individuals whose property was confiscated by Nazi authorities without being subjected, immediately after the war, to Czech nationalization and who, therefore, could benefit from the laws of 1991 and 1994. Irrespective of whether the arbitrariness in question was inherent in the law itself or whether it resulted from the application of the law by the courts of the State party, the Committee finds that the author was denied his right to equal protection of the law in violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it substantiate a violation of article 26 in conjunction with article 2 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. Such remedy should include restitution of the property or compensation, and appropriate compensation for the period during which the author and his widow were deprived of the property, starting on the date of the court decision of 20 November 1995 and ending on the date when the restitution has been completed. The State party should review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination in contravention of article 26 of the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.

Note

[1] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

O. Communication No. 779/1997, Äärelä and Näkkäläjärvi v. Finland (Views adopted on 24 October 2001, seventy-third session)*

Submitted by:	Mrs. Anni Äärelä and Mr. Jouni Näkkäläjärvi (represented by counsel, Ms. Johanna Ojala)
Alleged victims:	The authors
State party:	Finland
Date of communication:	4 November 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 October 2001,

Having concluded its consideration of Communication No. 779/1997, submitted to the Human Rights Committee by Mrs. Anni Äärelä and Mr. Jouni Näkkäläjärvi under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Martin Scheinin did not participate in the examination of the case.

The texts of a concurring individual opinion signed by Mr. Prafullachandra Natwarlal Bhagwati, and of a partly dissenting opinion signed by Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Eckart Klein, Mr. Ivan Shearer and Mr. Max Yalden are appended to the present document.

Views under article 5, paragraph 4, of the *Optional Protocol*

1. The authors of the communication, dated 4 November 1997, are Anni Äärelä and Jouni Näkkäläjärvi, both Finnish nationals. They claim to be victims of a violation by Finland of articles 2, paragraph 3, 14, paragraphs 1 and 2, and 27 of the Covenant. They are represented by counsel.

The facts as submitted

2.1 The authors are reindeer breeders of Sami ethnic origin and members of the Sallivaara Reindeer Herding Co-operative. The Co-operative has 286,000 hectares of State-owned land available for reindeer husbandry. On 23 March 1994, the Committee declared a previous communication, brought by the authors among others and which alleged that logging and road construction activities in certain reindeer husbandry areas violated article 27 of the Covenant, inadmissible for non-exhaustion of domestic remedies.[1] In particular, the Committee considered that the State party had shown that article 27 could be invoked in the relevant domestic proceedings, which the authors should have engaged before coming to the Committee. Thereafter, following unsuccessful negotiations, the authors brought a suit in the Lappi District Court of first instance against the National Forestry and Park Service (Forestry Service). The suit sought the enjoinder, on the basis inter alia of article 27 of the Covenant, of any logging or road-construction in the Mirhaminmaa-Kariselkä area. This area is said to be amongst the best winter herding lands of the Sallivara Co-operative.

2.2 On 30 August 1996, the District Court decided, following an on-site forest inspection at the authors' request, to prohibit logging or road construction in the 92 hectare Kariselkä area, but to allow it in the Mirhaminmaa area.[2] The Court applied a test of "whether the harmful effects of felling are so great that they can be deemed to deny to the Sami a possibility of reindeer herding that is part of their culture, is adapted to modern developments, and is profitable and rational". The Court considered that logging in the Mirhaminmaa area would be of long-term benefit to reindeer herding in the area and would be convergent with those interests. In the Kariselkä area, differing environmental conditions meant that there would be a considerable long-term decrease in lichen reserves. Relying inter alia on the decisions of the Committee,[3] the Court found that these effects of logging, combined with the fact that the area was an emergency feeding ground, would prevent reindeer herding in that area. A factor in the decision was the disclosure that an expert testifying for the Forestry Service disclosed he had not visited the forest in question. After the decision, logging duly proceeded in the Mirhaminmaa area.

2.3 On appeal by the Forestry Service to the Rovaniemi Court of Appeal, the Forestry Board sought the then exceptional measure of oral hearings. The Court granted this motion, while rejecting the author's motion that the appellate court itself conduct an on-site inspection. The expert witness, having in the meanwhile examined the forest, repeated his first instance testimony for the Forestry Service. Another expert witness for the Forestry Service testified that the authors' herding cooperative would not suffer greatly in the reduction of herding land through the logging in question, however the Court was not informed that the witness already had proposed to the authorities that the authors' herd should be reduced by 500 owing to serious overgrazing.

2.4 On 11 July 1997, the Appeal Court, reversing the first instance decision, allowed logging also in the Kariselkä area, and awarded costs of 75,000 Finnish marks against the authors.[4] The Court took a different view of the expert evidence. It found that the small area of logging proposed (which would not involve further roadworks) would have minimal effects on the quantities of arboreal lichen and, over time, increase the amounts of ground lichen. In light of the finding that the area was not the main winter pasture and in recent years had not been used as a back-up area, the Court concluded it had not been shown that there would be adverse effects on reindeer in the long run and even the immediate effects would be small. The authors were not made aware by the Appeal Court or the Forestry Service that the latter had presented allegedly distorted arguments to the Court based on the Committee's finding of no violation of article 27 of the Covenant in the separate case of Jouni Länsman et al. v. Finland.[5] The authors learned of this brief only upon receiving the Appeal Court's judgement, in which it stated that the material had been taken into account, but that an opportunity for the authors to comment was "manifestly unnecessary". On 29 October 1997, the Supreme Court decided, in its discretion and without giving reasons, not to grant leave to appeal. Thereafter, logging took place in the Kariselkä area, but no roads were constructed.

2.5 On 15 December 1997, the Ombudsman decided that the municipality of Inari and its mayor had exerted inappropriate pressure on the authors by formally asking them to withdraw from their legal proceedings, but did not find that the Forestry Service had acted unlawfully or otherwise wrongly.[6] The Ombudsman limited his remedy to bringing this conclusion to the attention of the parties. On 1 June 1998, a decision of the Ministry of Agriculture and Forestry (of 13 November 1997) entered into effect reducing the permissible size of the Sallivaara herd by 500 head from 9,000 to 8,500 animals. On 3 and 11 November 1998, the Forestry Service required a total sum of over 20,000 Finnish marks from the authors towards meeting the costs judgement.[7] This sum distrained by the Forestry Service corresponds to a major share of the authors' taxable income.

The complaint

3.1 The authors claim a violation of article 27 of the Covenant in that the Appeal Court allowed logging and road construction in the Kariselkä area, comprising the best winter lands of the authors' herding cooperative. The authors contend that this logging in the herding lands, coupled with a reduction at the same time of the permissible number of reindeer, amounts to a denial of their right to enjoy their culture, in community with other Sami, for which the survival of reindeer herding is essential.

3.2 The authors claim a violation of article 14, paragraphs 1 and 2, of the Covenant, contending that the Appeal Court was not impartial, having prejudged the outcome of the case and violated the principle of equality of arms in (i) allowing oral hearings while denying an on-site inspection and (ii) taking into account material information without providing an opportunity to the other party to comment. The authors also contend that the award of costs against the authors at the appellate level, having succeeded at first instance, represents bias and effectively prevents other Sami from invoking Covenant rights to defend their culture and livelihood. There is no State assistance available to impecunious litigants to satisfy the imposition of costs.[8]

3.3 The authors also claim improper influence was exerted by the Forestry Service while the case was before the courts. They claim to have been harassed, to have had public meetings arranged to criticize them, to have had the municipality formally request withdrawal of the suit or risk endangering the herding cooperative's economic development, and to have had the Forestry Service make unfounded allegations of criminal conduct against one of the authors.

3.4 The authors claim that the Supreme Court's unreasoned decision denying leave to appeal violated the right to an effective remedy within the meaning of article 2, paragraph 3, of the Covenant. They contend that the denial of leave to appeal to the Supreme Court, where a miscarriage of justice, in violation of article 14, had been demonstrated, means no effective remedy existed for that violation.

The State party's submissions with respect to the admissibility and merits of the communication

4.1 The State party responded to the communication by submission dated 10 April 1999. The State party contests the admissibility of the case. It argues that, in respect of some claims, domestic remedies have not been exhausted. As the authors did not appeal against the part of the first instance judgement that allowed logging and road construction in the Mirhaminmaa area, they have not exhausted available domestic remedies and that part of the claim is not admissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 The State party argues that no violation of any provision of the Covenant has been shown. As to the claims under article 27, the State party accepts that the Sami community is an ethnic minority protected under that provision, and that individuals are entitled to its protection. It accepts further that reindeer husbandry is an accepted part of Sami culture and is accordingly protected under article 27 insofar as is essential to the Sami culture and necessary for its survival.

4.3 The State party argues however, referring to Lovelace v. Canada[9] and Ilmari Länsman et al. v. Finland,[10] that not every interference which in some limited way alters previous conditions can be regarded as a denial of article 27 rights. In the Länsman case, the Committee articulated a test of whether the impact is "so substantial that it does effectively deny [article 27 rights]". The State party also refers to jurisprudence of the Norwegian Supreme Court and the European Commission on Human Rights requiring serious and significant interference with indigenous interests before justiciable issues arise.[11]

4.4 In the present case, the State party emphasizes the limited extent of the Kariselkä logging, amounting to 92 hectares of a total of 286,000 hectares of the Co-operative's total lands. The State party refers to the facts in the Jouni Länsman et al. v. Finland[12] case, where the Committee considered logging covering 3,000 of 255,000 hectares not to disclose a violation of article 27.

4.5 The State party points out that the author's claims were thoroughly examined in two courts, which considered the case explicitly in the light of article 27 of the Covenant. The courts heard expert witnesses, examined extensive documentary material and conducted an on-site inspection before coming to an evaluation of the facts. The Court of Appeal determined that the lichen pastures were poor, and that logging would assist the recovery of such lichen.[13]

The intermediate cutting envisaged was also a lower impact form of logging that would have less significant effects, and was less than the logging envisaged in the Jouni Länsman case where the Committee found no breach. The State party also contests whether the Kariselkä area could be described as "best (winter) herding lands", noting that the Court found that the area was not the main pasture area in winter, and in recent years had not even been used as a back-up area.

4.6 The State party also emphasizes that, as required by the Committee in Jouni Länsman, the affected persons effectively participated in the decisions affecting them. The Forestry Service plans were developed in consultation with reindeer owners as key stakeholder groups. The Sallivaara Committee's opinion resulted in a course being adopted different to that originally recommended by the Wilderness Committee to reconcile forestry and herding, including a reduced area available to forestry. In this connection the State party refers extensively to the legal obligations on the Forestry Service to sustainably manage and protect natural resources, including the requirements of Sami reindeer herding culture.[14] Accordingly, the State party argues that the different interests of forestry and reindeer husbandry have been properly weighed in coming to the most appropriate forestry management measures.

4.7 The State party points to the Committee's approval of this kind of reconciliation in Ilmari Länsman, where it considered that for planned economic activities to be consistent with article 27 the authors had to be able to continue to benefit from husbandry. The measures contemplated here also assist reindeer husbandry by stabilizing lichen supplies and are compatible with it. Moreover, many herdsmen, including the authors, practise forestry on their lands in addition to pursuing husbandry.

4.8 Finally, the State party contends that, contrary to the authors' assertion, no decision to reduce reindeer numbers has been made, although the Herdsmen's Committees and the Sami Parliament have provided opinions.

4.9 In sum, the State party argues with respect to this claim that the authors' right to enjoy Sami culture, including reindeer husbandry, has been appropriately taken into consideration in the case. While the logging and consequential waste will temporarily have certain adverse effects on the pasture, it has not been shown that the consequences would create considerable and long-term effects which would prevent the authors from continuing reindeer herding in the area to its present extent. On the contrary, it has been indicated that due to heavy grazing the pastures were in bad condition and needed to recover. Furthermore, the area in question is a very small proportion of the Co-operative's area, and during winter the area has been used mostly at times of crisis in the 1970s and 1980s.

4.10 As to the authors' claims under article 14, the State party rejects that either the imposition of legal costs or the procedures pursued by the courts reveal violations of article 14.

4.11 As to the imposition of costs, the State party points out that under its law there is an obligation for the losing party to pay, when sought, the reasonable legal costs of the successful party.[15] The law does not alter this situation when the parties are a private individual and public authority, or when the case involves human rights issues. These principles are the same in many other States, including Austria, Germany, Norway and Sweden, and are justified as a means of avoiding unnecessary legal proceedings and delays. The State party argues this mechanism, along with free legal aid for lawyers' expenses, ensures equality in the courts between plaintiffs and defendants. The State party notes however that, from 1 June 1999, an amendment to the law will permit a court ex officio to reduce a costs order that would otherwise be manifestly unreasonable or inequitable with regard to the facts resulting in the proceedings, the position of the parties and the significance of the matter.

4.12 In the present case, the award of costs against the authors was 10,000 Finnish marks lower than the sum of 83,765.59 Finnish marks actually sought by the Forestry Service.

4.13 As to the procedure adopted by the Court of Appeal, the State party argues that under its law (as it then was), it is not for the parties to decide on an oral hearing, but for the court to arrange one where it was necessary to assess the reliability and weight of oral witness statements taken in the district court. As to the refusal to make an on-site inspection, the Court considered, after the full oral hearing and evidence, that such an inspection would not provide any further relevant evidence. The District Court records of inspection were not in dispute, and accordingly an inspection was not necessary. The State party notes that a witness could go and see the relevant area, and such a visit cannot have jeopardized the interests of justice. However, the Court's judgement does not show whether the witness had in fact gone to the forest, or how decisive that evidence was. The authors also had a witness familiar with the forest in question.

4.14 As to the observations on the Jouni Länsman case submitted by the Forestry Service after the expiry of the appeal time limit, the State party notes that this occurred simply because the Committee's Views were delivered after that point. The Forestry Service letter contained only factual description of the decision and no detailed comment,[16] and the State party therefore considered it manifestly unnecessary to request comments from the other party. The State party notes that the court could in any event have taken the Committee's Views into account ex officio as a source of law, and that both parties could have commented on the Views in the oral hearing.

4.15 The State party rejects the authors' contentions that there is no right to an effective remedy, in breach of article 2. The Covenant is directly incorporated into Finnish law and can be (and was) directly pleaded before all levels of the courts. Any first instance decision may be appealed, while appellate judgements may only be appealed with leave. This is granted only when necessary to ensure consistent court practice, when there is a procedural or other fault requiring annulment of the lower decision, or where other weighty reasons exist. Here, two full instances gave comprehensive consideration to the authors' claims and arguments.

4.16 As to the general claims of harassment and interference, the State party observes that the Forestry Service reported to the police a suspected offence of unauthorized felling of timber on State land by one author's husband. While the matter is still under police investigation, the author in question has paid the Forestry Service compensation for the damage and costs of investigation. However, these matters have not affected the Forestry Service's conduct in the issues raised by the communication.

The authors' response to the State party's submissions

5.1 The authors responded to the State party's submissions on 10 October 1999.

5.2 As to the admissibility of the communication, the authors state that they did not seek remedies for the logging in the Mirhaminmaa area, concentrating in the Court of Appeal on defending the District Court's decision on the Kariselkä area.

5.3 As to the merits, the authors argue, however, that the logging of the Mirhaminmaa area immediately and necessarily affect the authors' article 27 rights. This logging in the best winterlands of the Co-operative increasingly encroaches on the authors' husbandry and increases the strategic significance of the Kariselkä area for herding, and should therefore be taken into account. The Kariselkä area becomes especially crucial during crisis situations in winter and spring, when the reindeer are suffering from lack of nourishment due to the paucity of such areas. The authors argue that the Kariselkä area's significance has also increased since other activities in the area limit the possibilities for herding, including large-scale gold mining, other mineral mining, large-scale tourism, and the operation of a radar station. They point out that the reduced amount of land available for herding after such encroachments has contributed to overgrazing of the remaining pastures. The authors point out that in any event the logging in the Kariselkä area has been undertaken.

5.4 The authors dispute the State party's observation that no decision aimed at reducing reindeer numbers has been made, and in substantiation submit the text of a decision of the Ministry of Agriculture and Forestry, dated 13 November 1997 which entered into effect on 1 June 1998, reducing the Sallivaara herd by 500 head from 9,000 to 8,500 animals. This reduction was a consequence of poor pasture conditions (itself acknowledged by the State party), while the Court of Appeal allegedly concluded that the pastures were sufficient and in good condition. The authors also object to the State party's reference to the authors' own logging activities, stating these were necessary to secure their subsistence in poor economic conditions and were in any event not comparable in scale to the logging undertaken by the State party.

5.5 As to the State party's arguments on the issues raised under article 14 in the communication, the authors clarify, on the issue of the award of legal costs, that the now amended and more flexible regime regarding costs did not apply to them. That amendment was made partly as a result of the filing of this communication. The authors point out that the Forestry Authority, in enforcing the award of costs, publicly announced that it sought to "prevent unnecessary trials". However, the fact that the authors prevailed at first instance demonstrates that this trial at least could not be considered unnecessary.

5.6 On the issue of the oral hearing and failure to undertake an on-site inspection by the Court of Appeal, the authors note that, while an oral hearing was at the time exceptional, they do no object to the oral hearing as such but to the proceedings as a whole. The overall proceedings were unfair, because whereas an oral hearing was granted, an on-site inspection was denied. The authors contend that the request for an on-site inspection was denied by the Court before all witnesses at the hearing had been heard. In any case, according to Finnish procedure an on-site inspection should have been carried out *before* the main hearing. The authors also contend that the records of inspection (comprising one page of minutes and some photographs) do not and cannot replace an on-site inspection lasting a day.

5.7 As to the submissions by the Forestry Service to the Court of Appeal after the expiry of time, the authors state that the submissions included the Committee's Jouni Länsman Views and a brief. At the commencement of the oral hearing, the authors sought to provide the decision to the Court and were informed that the Forestry Service had already provided it. The Court did not mention the brief, which did not come to the notice of the authors during the hearings. According to the authors, the brief included an incorrect interpretation of the Committee's Views, as shown by the translation supplied by the State party. It could not mean, as the Forestry Service claimed, that no violation of the Covenant had occurred in the *present* case. The two cases were clearly different, as the Jouni Länsman Views rested on the treatment afforded in that case by the national courts, which in the present case was still continuing. The authors consider the brief had a relevant impact on the Court's decision, and the authors were unable to respond to it, in violation of their rights under article 14. That violation was not cured by the Supreme Court, which denied leave to appeal. Article 27 was also violated as the logging proceeded as a consequence of proceedings conducted in breach of article 14.

5.8 On 7 August 2001, the authors supplied a further decision of the Ministry of Agriculture of 17 January 2000 to reduce the Sallivaara Co-operative's herd by a further 1,000 head (from 8,500 to 7,500 animals) on account of poor pasture condition. This constitutes a 17 per cent reduction in the total size of the herd in two and a half years.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As the authors' complaints do not relate to the Mirhamiamaa area per se, it is not necessary for the Committee to pronounce on the arguments on admissibility adduced by the State party related to this area.

6.3 As to the authors' claim of inappropriate interference by the municipality of Inari, the Committee considers that, in circumstances where the legal proceedings subject to attempted interference were in fact pursued, the authors have failed to substantiate their arguments that these facts give rise to a violation of a right contained in the Covenant.

6.4 As to the authors' claims that they suffered harassment and intimidation in the course of the proceedings in that the Forestry Authority convened a public meeting to criticize the authors and made an unfounded allegation of theft, the authors have failed to detail their allegations in this regard. The lack of any materials in substantiation beyond those allegations themselves leaves the Committee unable to properly consider the substance of the allegations and their effects on the proceedings. Accordingly, this part of the communication has not been substantiated sufficiently, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

7.1 The Committee finds the remaining portions of the communication admissible and proceeds to a consideration of the merits. The Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.2 As to the authors' argument that the imposition of a substantial award of costs against them at the appellate level violated their rights under article 14, paragraph 1, to equal access to the courts, the Committee considers that a rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts. In the particular case, the Committee notes that the authors were private individuals bringing a case alleging breaches of their rights under article 27 of the Covenant. In the circumstances, the Committee considers that the imposition by the Court of Appeal of substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under article 14, paragraph 1, in conjunction with article 2 of the Covenant. The Committee notes that, in the light of the relevant amendments to the law governing judicial procedure in 1999, the State party's courts now possess the discretion to consider these elements on a case-by-case basis.

7.3 As to the authors' claims under article 14 that the procedure applied by the Court of Appeal was unfair in that an oral hearing was granted and an on-site inspection was denied, the Committee considers that, as a general rule, the procedural practice applied by domestic courts is a matter for the courts to determine in the interests of justice. The onus is on the authors to show that a particular practice has given rise to unfairness in the particular proceedings. In the present case, an oral hearing was granted as the Court found it necessary to determine the reliability and weight to be accorded to oral testimony. The authors have not shown that this decision was manifestly arbitrary or otherwise amounted to a denial of justice. As to the decision not to pursue an on-site inspection, the Committee considers that the authors have failed to show that the Court of Appeal's decision to rely on the District Court's inspection of the area and the records of those proceedings injected unfairness into the hearing or demonstrably altered the outcome of the case. Accordingly, the Committee is unable to find a violation of article 14 in the procedure applied by the Court of Appeal in these respects.

7.4 As to the authors' contention that the Court of Appeal violated the authors' right to a fair trial contained in article 14, paragraph 1, by failing to afford the authors an opportunity to comment on the brief containing legal argument submitted by the Forestry Authority after expiry of filing limits, the Committee notes that it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.[17] The Court of Appeal states that it had "special reason" to take account of these particular submissions made by the one party, while finding it "manifestly unnecessary" to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.

7.5 Turning to the claim of a violation of article 27 in that logging was permitted in the Kariselkä area, the Committee notes that it is undisputed that the authors are members of a minority culture and that reindeer husbandry is an essential element of their culture. The Committee's approach in the past has been to enquire whether interference by the State party in that husbandry is so substantial that it has failed to properly protect the authors' right to enjoy their culture. The question therefore before the Committee is whether the logging of the 92 hectares of the Kariselkä area rises to such a threshold.

7.6 The Committee notes that the authors, and other key stakeholder groups, were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response to criticisms from those quarters. The District Court's evaluation of the partly conflicting expert evidence, coupled with an on-site inspection, determined that the Kariselkä area was necessary for the authors to enjoy their cultural rights under article 27 of the Covenant. The appellate court finding took a different view of the evidence, finding also from the point of view of article 27, that the proposed logging would partially contribute to the long-term sustainability of reindeer husbandry by allowing regeneration of ground lichen in particular, and moreover that the area in question was of secondary importance to husbandry in the overall context of the Collective's lands. The Committee, basing itself on the submissions before it from both the authors and the State party, considers that it does not have sufficient information before it in order to be able to draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under article 27 of the Covenant. Therefore, the Committee is unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant.

7.7 In the light of the Committee's findings above, it is not necessary to consider the authors' additional claims brought under article 2 of the Covenant.

8.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by Finland of article 14, paragraph 1, taken in conjunction with article 2 of the Covenant, and additionally a violation of article 14, paragraph 1, of the Covenant taken alone.

8.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an effective remedy. In terms of the award of costs against the authors, the Committee considers that as the costs award violated article 14, paragraph 1, of the Covenant and, moreover, followed proceedings themselves in violation of article 14, paragraph 1, the State party is under an obligation to restitute to the authors that proportion of the costs award already recovered, and to refrain from seeking execution of any further portion of the award. As to the violation of article 14, paragraph 1, arising from the process applied by the Court of Appeal in handling the brief submitted late by the Forestry Service (para. 7.4), the Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims. The State party is also under an obligation to ensure that similar violations do not occur in the future.

9. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is requested also to give publicity to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Sara et al. v. Finland, Communication No. 431/1990.

[2] The State party points out that the 92 hectare area amounts to some 3 per cent of the 6,900 hectares of the Co-operative's lands used for forestry.

[3] Sara v. Finland (Communication No. 431/1990), Kitok v. Sweden (Communication No. 197/1985), Ominayak v. Canada (Communication No. 167/1984), Ilmari Länsman v. Finland (Communication No. 511/1992); and moreover the Committee's General Comments 23 (50).

[4] Costs, for which the authors were jointly liable, totalled 73,965.28 Finnish marks, with 11 per cent annual interest.

[5] Communication No. 671/1995.

[6] The complaint had been submitted almost three years earlier.

[7] No information is provided on whether the Forestry Service is pursuing the outstanding portion of costs awarded to it (some 55,000 Finnish marks).

[8] The authors were also represented pro bono throughout the proceedings.

[9] Communication No. 24/1977.

[10] Communication No. 511/1992.

[11] Alta case, Norwegian Supreme Court, 26 February 1982, and G. and E. v. Norway, Application No. 9278/1981 and 9415/1981 (joined), Decisions and Reports of the European Commission of Human Rights, vol. 35.

[12] Communication No. 671/1995.

[13] The State party notes that another cooperative had proposed this form of logging in their area in order to stimulate lichen growth.

[14] The State party refers to annex s.2, Act on the National Forestry and Park Service 1993; annex s.11, Decree on the Finnish Forestry and Park Service 1993; and documentation of the Ministry of Agriculture and Forestry's working group on reindeer husbandry.

[15] Chapter 21, section 1, Code of Judicial Procedure 1993.

[16] The full text of the relevant parts of the letter reads: "The decision of the Human Rights Committee concerns the communication made by the authors who consider that their case was not duly considered by the Finnish courts and that the outcome of the case was not correct. The Human Rights Committee rejected the communication considering that the Supreme Court came to the right conclusion. At the same time the Human Rights Committee found that the logging executed and planned by the National Forest and Park Service in the Angeli area did not constitute a denial of the authors' right to practise reindeer herding as a part of their cultural heritage in accordance with article 27 of the Covenant on Civil and Political Rights. Since the Human Rights Committee came to the same conclusion as the Supreme Court, the decision supports the observations of the National Forest and Park Service."

[17] In Jansen-Gielen v. The Netherlands (Communication No. 846/1999), the Committee stated: "Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit *to ensure that each party could challenge the documentary evidence which the other filed* or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant." (emphasis added)

APPENDIX

Individual opinion of Committee member Mr. Prafullachandra N. Bhagwati (concurring)

I have gone through the text of the views expressed by the majority members of the Committee. I agree with those views save in respect of paragraph 7.2 and, partly, in respect of paragraph 8.2. Since I am in substantial agreement with the majority on most of the issues, I do not think it necessary to set out the facts again in my opinion and I will therefore straightaway proceed to discuss my dissenting opinion in regard to paragraphs 7.2 and 8.2.

So far as the alleged violation of article 14, paragraph 1, in conjunction with article 2, by the imposition of substantial costs is concerned, the majority members have taken the view that such imposition, on the facts and circumstances of the case, constitutes a violation of those articles. While some of the members have expressed a dissenting view, I agree with the majority view but I would reason in a slightly different way.

It is clear that under the law as it then stood, the Court had no discretion in the matter of award of costs. The Court was under a statutory obligation to award costs to the winning party. The Court could not tailor the award of costs - even refuse to award costs - against the losing party taking into account the nature of the litigation, the public interest involved, and the financial condition of the party. Such a legal provision had a chilling effect on the exercise of the right of access to justice by none too wealthy litigants, and particularly those pursuing an actio popularis. The imposition of substantial costs under such a rigid and blindfolded legal provision in the circumstances of the present case, where two members of the Sami tribe were pursuing public interest litigation to safeguard their cultural rights against what they felt to be a serious violation, would, in my opinion, be a clear violation of article 14, paragraph 1, in conjunction with article 2. It is a matter of satisfaction that such a situation would not arise in the future, because we are told that the law in regard to the imposition of costs has since been amended. Now the Court has a discretion whether to award costs at all to the winning party, and, if so, what the amount of such costs should be depending upon various circumstances such as those I have mentioned above.

So far as paragraph 8.2 is concerned, I would hold that the authors are entitled to the relief set out in paragraph 8.2 in regard to the costs, not only because the award of costs followed upon the proceedings in the appellate Court which were themselves in violation of article 14, paragraph 1, for the reasons set out in paragraph 7.4, but also because the award of costs was itself in violation of article 14, paragraph 1, read in conjunction with article 2, for the reasons set out in paragraph 7.2. I entirely agree with the rest of paragraph 8.2

(Signed) Prafullachandra N. Bhagwati

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee members Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Eckart Klein, Mr. Ivan Shearer and Mr. Max Yalden (partly dissenting)

While we share the Committee's general approach with regard to the award of costs (see also Lindon v Australia (Communication No. 646/1995)), we cannot agree that in the present case it has convincingly been argued and proven that the authors were in fact so seriously affected by the relevant decision taken at the appellate level that access to the court was or would in future be closed to them. In our view, they have failed to substantiate a claim of financial hardship.

Concerning possible deterrent effects in future on the authors or other potential authors, due note must be given to the amendment of the code of judicial procedure according to which a court has the power to reduce a costs order that would be manifestly unreasonable or inequitable, having regard to the concrete circumstances of a given case (see paragraph 4.11 above).

However, given that we share the view that the Court of Appeal's judgement is vitiated by a violation of article 14, paragraph 1, of the Covenant (see paragraph 7.4 above), its decision relating to the costs is necessarily affected as well. We therefore join the Committee's finding that the State party is under an obligation to refund to the authors that proportion of the costs award already recovered, and to refrain from executing any further portion of the award (see paragraph 8.2 of the Committee's views).

(Signed) Abdelfattah Amor

(Signed) Nisuke Ando

(Signed) Christine Chanet

(Signed) Eckart Klein

(Signed) Ivan Shearer

(Signed) Max Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

P. Communication No. 788/1997, Cagas v. The Philippines (Views adopted on 23 October 2001, seventy-third session)*

Submitted by:	Messrs. Geniuval M. Cagas, Wilson Butin and Julio Astillero (represented by Crusade against Miscarriage of Justice, Inc.)
Alleged victims:	The authors
State party:	The Philippines
Date of communication:	17 September 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 2001,

Having concluded its consideration of Communication No. 788/1997, submitted to the Human Rights Committee by Messrs. Geniuval M. Cagas, Wilson Butin and Julio Astillero under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 17 September 1996, are Mr. Geniuval M. Cagas, Mr. Wilson Butin and Mr. Julio Astillero, all citizens of the Philippines and currently detained in Tinangis Jail and Penal Farm, Philippines. They claim to be victims of a violation by the Philippines of article 14 (2) of the Covenant. They are represented by Crusade against Miscarriage of Justice, Inc., a non-governmental organization.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

The texts of two individual opinions signed by three Committee members, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada and Mr. Hipólito Solari Yrigoyen, are appended to the present document.

The facts as presented by the authors

2.1 On 23 June 1992, the police of Libmanan, Camarines Sur, Philippines, found the bodies of six women in the house of Dr. Dolores Arevalo, one of the victims. Their hands had been bound and their heads smashed.

2.2 Although there was no eyewitness to the actual killings, a neighbour, Mr. Publio Rili, claims to have seen four men entering the house of Dr. Arevalo during the evening of 22 June 1992. Mr. Rili later identified the three authors as being among the individuals he saw on the evening in question. Soon after the four men entered the house, the same witness heard "thudding sounds" emanating from the house of Dr. Arevalo. He then saw a car driving away from the premises.

2.3 During the same night, a policeman saw the car in question and wrote down its number plate. The investigation later revealed that the number plate was that of a car owned by Mr. Cagas. The two other co-accused and authors are Mr. Cagas' employees.

2.4 According to the investigation, Mr. Cagas was a supplier of medicines in a hospital where Dr. Arevalo was appointed Chief of Hospital sometime before the incident. It was also reported that Dr. Arevalo refused to purchase medical supplies from Mr. Cagas.

2.5 The prosecution submitted to the Court a certified copy of a telegram that had allegedly been sent by Mr. Cagas to Dr. Arevalo's husband, asking him to tell his wife, Dr. Arevalo, not to ask for rebates in medical supplies any longer.

2.6 The authors were arrested on 26, 29 and 30 June 1992, on suspicion of murder (the so-called Libmanan massacre). They claim that they are innocent.

2.7 On 14 August 1992, the authors appeared in Court and were ordered detained until the trial. On 11 November 1992, the authors filed a petition for bail and on 1 December 1992, they filed a motion to quash the arrest warrants. On 22 October 1993, the regional Trial Court refused to grant bail. On 12 October 1994, the Court of Appeals in Manila confirmed the Trial Court Order of 22 October 1993. A motion for reconsideration of the Court of Appeals' decision was dismissed on 20 February 1995. On 21 August 1995, the Supreme Court dismissed the authors' appeal against the Court of Appeals' decision.

2.8 On 5 June 1996, Mr. Cagas sent a letter on behalf of the authors to the Court Administrator of the Supreme Court, submitting additional facts in support of their claim that their right to bail had been wrongly denied.

2.9 On 26 July 1996, the Court Administrator replied to the authors that they were no longer entitled to raise issues that were not raised before the Supreme Court.

2.10 In a further submission of 29 May 1998, the authors allege that on 24 and 25 March 1997, one of them, Mr. Julio Astillero had been subjected to "alcohol torture or treatment"[1] by prison guards with the purpose to force him to become a "State witness". The alleged ill-treatment had been reported to Judge Martin Badong, the then presiding judge of the regional trial court, but the latter took no action in this respect.

The complaint

3.1 The authors alleged a violation of article 14 (2) of the Covenant. They claim that the order for pre-trial detention is based solely on circumstantial evidence, which is not sufficient to justify a denial of bail and that this order has not been properly reviewed by higher courts, which have refused to reconsider the facts as they were assessed by the trial judge.

3.2 The authors claim that, by rejecting their claim on 26 July 1996, the Court Administrator relied on a technicality rather than on the substance of the law, while the issue was related to fundamental constitutional rights.

3.3 The authors note that while the presumption of innocence is a principle embodied in the Philippine Constitution, accused who are denied bail are denied their right to presumption of innocence. They further contend that a denial of bail deprives them of adequate time and facilities to prepare their defence properly, which constitutes a breach of the principle of due process.

3.4 Although not expressly invoked by the authors, the facts as submitted raise issues under articles 9 (3) and 14 (3) of the Covenant in relation to the time that the authors have spent in pre-trial detention, and under articles 7 and 10 of the Covenant in relation to the alleged ill-treatment to which Mr. Julio Astillero was allegedly subjected on 24 and 25 March 1997.

Observations by the State party

4.1 In a submission dated 16 March 1998, the State party transmitted its observations on the merits of the case.

4.2 Emphasizing that the right to due process of law is the cornerstone of criminal prosecution in its jurisdiction, the State party considers that this principle is complied with as long as an accused has been heard by a competent court, prosecuted under the orderly process of law, and punished only after a judgement has been handed down in conformity with constitutional law.

4.3 The State party also points out that the right to bail can be denied whenever the charges are related to an offence punishable by "perpetual reclusion" and when the evidence is strong, an assessment that is left to the judge's discretion.

4.4 In the present case, the State party is of the opinion that the authors, although they were denied bail, have not been denied the right to be presumed innocent, because only a full trial on the merits would allow to declare them guilty beyond reasonable doubt.

4.5 Moreover, the State party considers that, although pre-trial detention is a situation in which the authors might lack adequate time and facilities to prepare their defence, the principle of such a detention does not detract from the essence of due process of law as long as the elements of due process referred to in paragraph 4.2 are present.

4.6 The State party emphasizes that Mr. Cagas had admitted in his letter of 5 June 1996 to the Court Administrator that "the defect noted in the Order of [22 October 1993] was never raised in the certiorari that reached the Court of Appeals and the Supreme Court" and that Mr. Cagas admitted to have directly addressed his grievance to the Court Administrator. The State party notes in this respect that the Office of the Court Administrator is under the authority of the Supreme Court and is not in any manner involved in the adjudication of cases; it therefore lacks the competence to review decisions taken by the Supreme Court. The State party further indicates that the authors were duly represented by a prominent human rights attorney.

Comments by the authors

5.1 In a letter dated 29 May 1998, the authors submitted their comments on the observations of the State party.

5.2 The authors reiterate their claim that when bail is denied, the constitutional right of an accused to be presumed innocent is substantially impaired. Moreover, when an accused is detained before the trial, he lacks adequate time and facilities for the preparation of his defence, which eventually leads to the loss of substantive due process.

5.3 As a general rule, bail may be granted in all criminal proceedings. The only exception to this rule is when an accused is charged with a capital offence carrying a severe penalty and, most importantly, when the evidence against the accused is strong. This also requires that any exception to the right to bail must be adequately justified in the decision.

5.4 In the present case, the authors are of the opinion that the justification for the denial of bail is absent from the Order of the Trial Court of 22 October 1993. Moreover, they suggest that the requirement of strong evidence was not satisfied. In this regard, the authors note that the prosecution merely showed that they were suspects who might have committed the crime, basing their findings on circumstantial evidence. The authors consider that, in the absence of an eyewitness who saw the actual murders, circumstantial evidence presented in the case is not sufficient to prove that the authors were the perpetrators of the crime.

5.5 The authors also note that both the Court of Appeals and the Supreme Court have limited their consideration on a procedural aspect of the case, considering that the assessment of facts was at the trial judge's discretion, and have not addressed the issue of the right to bail by assessing the constitutional requirement of strong evidence to deny bail. The authors have thereafter raised this issue with the Court Administrator, claiming that the latter has the power and duty to call the attention of trial judges when a travesty of justice is manifestly occurring within his jurisdiction.

5.6 In order to enable the Committee to take its decision in the light of all appropriate information, the authors also draw the attention of the Committee to the following latest developments:

- A motion for reinvestigation was denied on 20 May 1998;
- The original telegram allegedly sent by Mr. Cagas to Mrs. Arevalo's husband and primarily used by the prosecution to establish the motive for the crime was never produced and is apparently lost. The authors provide certificates according to which the original of this document cannot be found.

Further observations by the State party

6. The preceding comments were submitted to the State party on 30 October 1998. On 20 September 2000, another letter was sent to the State party inviting it to submit its observations on the merits of the case. By a note verbale of 2 October 2000, the State party informed the Committee that it did not wish to make any further comments on the case and referred to its previous submission of 16 March 1998.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

7.2 Noting that the State party has not raised any objections to the admissibility of the communication, that the authors have exhausted all available domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement, the Committee declares the communication admissible.

7.3 With regard to the allegation of violation of article 14 (2), on account of the denial of bail, the Committee finds that this denial did not a priori affect the right of the authors to be presumed innocent. Nevertheless, the Committee is of the opinion that the excessive period of preventive detention, exceeding nine years, does affect the right to be presumed innocent and therefore reveals a violation of article 14 (2).

7.4 With regard to the issues raised under articles 9 (3) and 14 (3) of the Covenant, the Committee notes that, at the time of the submission of the communication, the authors had been detained for a period of more than four years, and had not yet been tried. The Committee further notes that, at the time of the adoption of the Committee's Views, the authors appear to have been detained without trial for a period in excess of nine years, which would seriously affect the fairness of the trial. Recalling its General Comment 8 according to which "pre-trial detention should be an exception and as short as possible, and noting that the State party has not provided any explanation justifying such a long delay, the Committee considers that the period of pre-trial detention constitutes in the present case an unreasonable delay. The Committee therefore concludes that the facts before it reveal a violation of article 9 (3) of the Covenant. Furthermore, recalling the State party's obligation to ensure that an accused person be tried without undue delay, the Committee finds that the facts before it also reveal a violation of article 14 (3) (c) of the Covenant.

7.5 With regard to the allegations of ill-treatment suffered by Mr. Julio Astillero, the Committee notes that the allegations are very general in nature, and fail to describe the nature of the acts which were allegedly carried out. Thus, while the State party did not respond to the Committee's invitation to comment on the authors' submission of 29 May 1998, the Committee is of the opinion that the authors have not sufficiently substantiated that the rights of Mr. Astillero under articles 7 and 10 of the Covenant were violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9 (3), 14 (2) and 14 (3) (c) of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which shall entail adequate compensation for the time they have spent unlawfully in detention. The State party is also under an obligation to ensure that the authors be tried promptly with all the guarantees set forth in article 14 or, if this is not possible, released.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The authors do not explain in their communication what such a treatment entails.

APPENDIX

Individual opinion of Committee members Ms. Cecilia Medina Quiroga and Mr. Rafael Rivas Posada (dissenting)

In this case, the Committee has decided that the Philippines violated, to the detriment of Mr. Cagas, Mr. Butin and Mr. Astillero, articles 9 (3), 14 (2) and 14 (3) of the International Covenant on Civil and Political Rights. In this respect I concur with the majority vote, but I dissent from that vote in that I believe that the Committee should also have found that the State had violated article 14 (1) of the Covenant. I explain my reasons below:

(a) In the file before the Committee there is no indication that the three authors of the communication have been tried and have been convicted and sentenced to a custodial penalty. It may therefore be presumed that they have been deprived of their liberty for a period of nine years without a trial and without a conviction, since it was the responsibility of the State to inform the Committee about this matter, and this has not so far been done. This is a clear violation of articles 9 (3) and 14 (3) of the Covenant. It should be noted that such a lengthy deprivation of liberty can only be considered as equivalent to the serving of a sentence, in this case without a conviction to back it up. This, in my opinion, calls into question the State party's compliance with the provisions of article 9 (1) of the Covenant, which prohibits arbitrary detention.

(b) The fact that for so many years no trial has been held, apart from constituting a violation of article 14 (3), inevitably jeopardizes the production of evidence. This vitiates any trial of the authors that may possibly be held. Thus, for example, the possibility that the judgement may be based on statements by witnesses, made many years after the events occurred, places the accused in a situation of defencelessness, contrary to the guarantees granted by the Covenant. It is not possible for a trial for homicide or murder, whichever the case may be, held nine or more years after the events to be a "fair trial" in the terms established by article 14 (1).

(c) Lastly, through having allowed time to pass without providing the accused with due process as laid down by the Covenant, the State has not only violated article 14 (1) by omission, but has placed itself in a position where it will be impossible for it to comply with the Covenant in the future. Consequently, and in addition, I cannot agree with paragraph 9 of the Views of the majority. I consider that, in the present case, it is incumbent on the State to release the detainees immediately. Obviously, there is a State interest in criminal prosecution, but this prosecution can be carried out only within the limits permitted by international law. If the organs of criminal justice in a State are ineffective, the State must solve the problem in a manner other than that of infringing the guarantees of the accused.

(Signed) Cecilia Medina Quiroga

(Signed) Rafael Rivas Posada

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (dissenting)

I base my dissenting vote, rejecting the majority vote concerning the violation of Covenant articles 7 and 10 suffered by the author Mr. Julio Astillero, on the following considerations:

In a communication of 29 May 1998, the authors stated that one of their number, Julio Astillero, had been subjected to torture on two occasions, on 24 and 25 March 1997. They called the kind of torture which he suffered "alcohol treatment" and named the principal perpetrator of this treatment as Marlon Argarin, who at that time was working as a prison guard at Tinangis Jail - Penal Farm in Pili, Camarines Sur region (Philippines), where they were being held. They further stated that the guard Argarin later became Chief of Security of the Operations Service and that in the practice of torture he enjoyed the complicity of other guards in the same prison where the events in question occurred. They also complained that the purpose of the torture inflicted on prisoner Astillero was to force him to become a "State witness".

In addition, the authors stated that a complaint concerning all these events was made before Judge Martin Badong, the President of the Court of First Instance, Branch 33, Pili, Camarines Sur region, who, according to them, took no action to investigate the complaint.

Although the authors did not explain what the so-called "alcohol treatment" consisted of, there is no doubt, in view of the complaint's terminology, which is consistent with the text of article 7 of the Covenant, that what was involved was torture or cruel, inhuman or degrading treatment or punishment, to which no one may be subjected. Since prisoner Astillero was deprived of his liberty and subjected to torture, he was not treated humanely or with the respect inherently due to the human individual.

The complaint about violation of articles 7 and 10 of the Covenant was fully substantiated by the following details:

(a) Dates on which the torture occurred;

(b) Place in which torture was perpetrated;

(c) Name of the alleged torturer;

(d) His job at the time of the torture;

(e) The post he later occupied;

(f) Existence of other accomplices;

(g) Jobs of the alleged accomplices;

(h) Specific reference to the complaint lodged about the torture;

(i) Name of the judge who received the complaint;

(j) Title of the judge; and

(k) Precise identification of the court with which the complaint was lodged.

All these comments by the authors, linked to the complaint of torture, together with other types of comments, were brought to the attention of the State party on 30 October 1998. The State party remained silent in the face of these comments, a fact which, as the Committee has declared on other occasions, constitutes a lack of cooperation through non-compliance with its obligation under article 4 (2) of the Optional Protocol to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

The State party's lack of cooperation was, moreover, repeated when, in reply to a further request by the Committee of 20 September 2000, in a note verbale it again stated that it wished to make no further comment on the question, referring to its initial communication of 16 March 1998. The observations made by the State party in that communication in no way clarify the acts of torture complained of, since these acts were notified to the Committee after the submission of the State's observations.

Consequently, the Committee should take the authors' complaints into account and, on the basis of all the elements before it, consider that there has been a violation of articles 7 and 10 of the Covenant to the detriment of the prisoner Julio Astillero.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Q. Communication No. 792/1998, Higginson v. Jamaica (Views adopted on 28 March 2002, seventy-fourth session)*

Submitted by:	Mr. Malcolm Higginson
Alleged victim:	The author
State party:	Jamaica
Date of communication:	20 January 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2002,

Having concluded its consideration of Communication No. 792/1998, submitted to the Human Rights Committee by Mr. Malcolm Higginson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, initial letter dated 20 January 1997, and subsequent letters dated May 1997 and 3 July 1997, is Malcolm Higginson, a Jamaican citizen, born on 20 March 1974, at the time of submission an inmate at the General Penitentiary Kingston, Jamaica. At present he is under detention at St. Catherine Adult Correction Centre. He claims that he is a victim of violations by Jamaica[1] of articles 2, 7 and 14 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 On 19 May 1995, the author was convicted of illegal possession of a firearm, rape and robbery with aggravation by the High Court Division Gun Court, Kingston, Jamaica, and sentenced to respectively 5, 10 and 7 years' imprisonment with hard labour, to run concurrently, and in addition to receive 6 strokes of the tamarind switch.

2.2 As it appears from the author's quotations from the Court hearing, on 19 May 1995, the trial against the author lasted for five days. During the trial the victim of the crime for which the author was charged testified that on 25 July 1993 at about 2.30 p.m. she went to see her boyfriend who worked at a funeral parlour in St. Andrew. On her way to the funeral parlour, she did not find her boyfriend but the author who was working for the same company. They talked for a few minutes, before the author's girlfriend came and the author and his girlfriend left together. After the author had left, a group of men, who were complete strangers to the victim and armed with a gun, surrounded her and took her to a room behind the funeral parlour where all of them raped her. According to the victim, the author entered the room some time later. He was also carrying a gun. The victim asked the author to rescue her. According to the victim, the author joined the group and raped her. The group of men also stole her watch and $200. Several hours after being brought to the funeral parlour, the victim was released and went home. After nine days she complained to the police and provided them with the author's name. On 29 October 1993, the author was arrested and charged with the crime. No other persons appear to have been charged in connection to the crime.

2.3 The author denied the allegation of gang rape and possession of a gun, whereas he admitted sexual intercourse with the woman on the same day, with her consent. The author stated that on the very same day, he had met the complainant and had talked with her. She came to his house, because she had trouble with her boyfriend, and it was she who took the initiative for intercourse.

2.4 During the trial, the case rested on the identification evidence of the victim. The victim stated that she heard somebody calling the author "Malcolm" during the rape, and thus she gave his name and description to the police. All the other men were strangers to her. The author however, submitted that when they were talking, they introduced themselves, and that's why she knew his name.

2.5 The author filed an application for leave to appeal on the grounds of unfair trial.[2] One of the grounds for appeal was that during the cross-examination of the victim with respect to the identification of the author, the judge stopped the counsel from continuing the cross-examination of the victim. The Court of Appeal rejected the application for leave to appeal.

The complaint

3.1 The author raises issues under article 14. He claims that the trial against him was unfair, since the judge stopped his counsel from continuing the cross-examination of the complainant and the conviction was based on the complainant's statements only. He further contends that the sentence of whipping entailed a violation of article 7 of the Covenant, because whipping constitutes cruel, inhuman and degrading punishment. According to the author, the Jamaican Constitution section 26 (8) by allowing the constitutionality of laws in force prior to the Constitution allows the imposition of corporal punishment. He claims that relying on statutes that prescribe such punishment violates article 2 of the Covenant. The State party should, according to the author, repeal such laws to bring domestic legislation into conformity with the Covenant to ensure the protection of the rights guaranteed in the Covenant.

3.2 The author also states that with the rejection of the application for leave to appeal, all domestic remedies have been exhausted.

Examination of admissibility and merits

4.1 The communication with its accompanying documents was transmitted to the State party on 14 January 1998. The State party has not responded to the Committee's request, under rule 91 of the rules of procedure, to submit information and observations in respect of the admissibility and the merits of the communication, nor to its request to the State party not to carry out the sentence of whipping against the author, pursuant to rule 86. Reminders of the above requests were addressed to the State party on 4 October 2000 and on 24 July 2001. Only on 24 May 2001, the State party notified the Committee that investigation of the allegations was being undertaken. The Committee recalls that it is implicit in the Optional Protocol that the State party make available to the Committee all information at its disposal in due course, and regrets the lack of cooperation by the State party in the present case. In the absence of information from the State party, due weight must be given to the author's allegations to the extent that they have been substantiated.

4.2 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.3 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation settlement.

4.4 With respect to exhaustion of domestic remedies, the Committee notes that the author has argued that he unsuccessfully sought leave to appeal, and that no further domestic remedy is available to him. The State party has not claimed that other domestic remedies are still available. The Committee considers therefore that it is not precluded by article 5, paragraph 2 (b) of the Optional Protocol from examining the communication.

4.5 Although the author's submission raises issues about the fairness of the trial under article 14, and even in the absence of any response by the State party, despite its promise to investigate the matter, the Committee considers that the author has not sufficiently substantiated for purposes of admissibility his allegations of a violation of article 14 of the Covenant. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

4.6 The remaining part of the communication, i.e., the author's claim under article 7 of the Covenant, is admissible. The author has claimed that the use of the tamarind switch constitutes cruel, inhuman and degrading punishment, and that the imposition of the sentence violated his rights under article 7 of the Covenant. The State party has not contested the claim. Irrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant. The Committee finds that the imposition or the execution of a sentence of whipping with the tamarind switch constitutes a violation of the author's rights under article 7.

5. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 7 of the International Covenant on Civil and Political Rights.

6. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including refraining from carrying out the sentence of whipping upon the author or providing appropriate compensation if the sentence has been carried out. The State party should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment.

7. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for Jamaica on 23 March 1976, and Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998.

[2] The author does not submit the date of the appeal nor the date of the Court of Appeal decision.

R. Communication No. 794/1998, Jalloh v. The Netherlands (Views adopted on 23 March 2002, seventy-fourth session)*

Submitted by:	Mr. Samba Jalloh (represented by counsel, Mr. Pieter Bouman)
Alleged victim:	The author
State party:	The Netherlands
Decision on admissibility:	6 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2002,

Having concluded its consideration of Communication No. 794/1998, submitted to the Human Rights Committee by Mr. Samba Jalloh under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Samba Jalloh. He claims to be a victim of a violation by the Netherlands of articles 9 and 24 of the Covenant. The author is represented by counsel.

The facts as presented

2.1 The author states that he is a national of the Ivory Coast and was born in 1979. He arrived in the Netherlands on or around 3 September 1995. The author had no identification documents in his possession on arrival, but on 15 October 1995 the immigration authorities recorded that he was 15 years of age. Earlier on 4 September 1995, he applied for asylum to the State Secretary for Justice. From this date until June 1996, the author was under the responsibility of the guardianship agency, which is appointed as the legal guardian of all unaccompanied minor asylum-seekers and aliens. The author was received and accommodated at an open facility.[1] On 12 December 1995, the author's application was refused. On 29 January 1996, he appealed this decision. On 12 June 1996, his appeal was dismissed.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Maxwell Yalden.

2.2 In August 1996, the author absconded from his reception facility and went into hiding out of fear of an immediate deportation.[2] His lawyer advised him to apply again for refugee status, in order to bring an end to his illegal status and to regain access to refugee accommodation. On 4 September 1996, the author made a second application for refugee status with the State Secretary for Justice. On 12 September 1996, following an interview with the Aliens Department, his detention was ordered for the following reasons: because he did not have a valid permit, because he did not possess a document proving his identity, because he did not have any financial means to live nor to return to his home country, and because of a serious suspicion that he would fail to cooperate with his removal.[3] On 17 September 1996, the author's second application for refugee status was dismissed.

2.3 On 24 September 1996, the author's request for a ruling that he was being unlawfully detained was rejected by the District Court of 's-Hertogenbosch, though the issue of his status as a minor was allegedly raised by counsel. From the judgement of the Court it appears that the author was brought before the representative of the Ivory Coast in Brussels to ascertain his identity, but with negative result. It also appears from the judgement that he was then presented to the Consulates of Sierra Leone and Mali, with equally negative results. On 8 November 1996, counsel filed a request to have the author's detention reviewed once more. On 2 December 1996, the same Court rejected the author's second request partly because a further identity investigation was being prepared to determine his nationality. However, on 9 January 1997, the State Secretary for Justice terminated the author's detention, as at that point there was no realistic prospect of expelling him. Notice was then served on the author that he must leave the Netherlands immediately.

2.4 On 5 February 1997, the author appealed against the refusal to grant him refugee status on the basis of his second application. The same Court, on 23 April 1997, decided to reopen proceedings to allow the author to undergo a medical examination. This examination took place in May 1997. On 4 June 1997, the report of a psychological examination and the results of X-ray tests to determine the author's age were made available to the Court. As a result, the Court declared the author's appeal well-founded and the State Secretary for Justice granted him a residence permit "admitted as an unaccompanied minor asylum-seeker" with effect from the date of his second asylum application.[4]

The complaint

3.1 In his initial submission, counsel claimed that the author's detention under the Aliens Act was in violation of articles 9 and 24 of the Covenant.[5] Counsel argued that the detention was arbitrary, because it is unreasonable to expect that the author would try to escape deportation, having voluntarily reported to the police on 4 September 1996 and because he was a minor. He further claimed that according to the State party's policy, minors who claim refugee status should be given a residence permit if they cannot be returned to their home country within six months.

3.2 In a letter, dated 16 December 1997, counsel informed the Committee that his client had obtained a residence permit, but that he still wishes to maintain the communication before the Committee in light of the author's unlawful three and half month detention.

The State party's observations

4.1 On the merits and with respect to the law, the State party explains that the detention of illegal immigrants is covered by section 26 of the Aliens Act. The State party underlines that detention of aliens is not a punishment but a measure aimed at facilitating expulsion and is limited to cases where the detention is necessary and effective. The courts can review the detention in the interests of the alien. The State party explains that unaccompanied minor aliens may also be detained in custody under the same section of the Aliens Act. However, the detention of minors is applied with great restraint.

4.2 In respect of the author's claim under article 9, the State party explains that the author was detained for three and half months under section 26 of the Aliens Act, because he had no valid residence permit, no identification documents, nor sufficient means of support, because there were serious grounds for suspicion that he would evade expulsion, and because the authorities had the impression that he was abusing the asylum procedures. Upon review by the Court, the Court held, on 24 September 1996, that the detention was lawful, that the author had evaded expulsion before, that he had not told the truth about his identity, and that there was sufficient prospect of expulsion in view of the preparation made by the State for an identity investigation by an expert.

4.3 The State party is of the opinion that its authorities acted with due care and not arbitrarily in relation to the author's detention. The purpose of the detention was under constant review by the implementing authorities and examined by an independent tribunal. The State party adds that at the time it was not possible to determine whether the author was under age.

4.4 With regard to the author's claim under article 24, the State party acknowledges that it has particular responsibilities in relation to minors. It explains that it has devised a special policy on unaccompanied minor asylum-seekers. Unaccompanied minor asylum-seekers are eligible for a residence permit subject to the restriction "admitted as an unaccompanied minor asylum-seeker". Such a permit is granted if the minor has applied for asylum but does not qualify for admission as such. In those cases, a residence permit is issued if it is established within six months of the submission of the asylum application that there is no suitable care provision in the country of origin. In assessing the first asylum application, the State Secretary for Justice considered whether the author qualified for residence status as an unaccompanied minor and concluded that he did not, as it could not be established that he was telling the truth, given the many conflicting statements the author had made and the doubt about his identity. The Court, in reviewing the denial of the author's first asylum request, considered that there were insufficient elements to conclude that the author was under age. In the second proceedings, however, the Court decided that the author should undergo a medical examination, in the light of a new issue of mental underdevelopment raised by him. On the basis of the medical and psychological information then received, the author was granted a residence permit.

Counsel's comments

5.1 In his comments, counsel notes that the author suffers from "serious mental underdevelopment", and that although the issue of mental underdevelopment was raised by counsel, it was not taken into account by the authorities when the author was detained. Only after intervention by the court in April 1997, were the author's problems finally recognized and he was granted a residence permit. Counsel explains that the complaint focuses on the fact that the authorities failed to recognize the author's lack of mental development and that he functions on the level of a five year old. In the specific circumstances of the author's case, his detention was not justified and constituted intimidation. According to counsel, the fact that the court reviewed the detention does not diminish the State party's responsibility.

5.2 On refusing to grant the author asylum, the court on two occasions failed to recognize that the author was mentally undeveloped and that it was for this reason that he could not explain his reasons for seeking asylum. The courts had interpreted his inability to express himself properly as an issue of credibility rather than incapacity.

State party's further submission

6. As to the inadequate development of the author's mental faculties, the State party submits that, on the two occasions when the Court was requested to determine the lawfulness of the author's detention in September and November of 1996 respectively, it was clear that he had never received any schooling and that his vocabulary and frame of reference were limited. However, the Court then did not consider those facts as sufficient ground for terminating his detention. Subsequently, in April 1997, the same Court decided to reopen proceedings to consider the author's appeal against the refusal to grant him refugee status and allowed the author to undergo a medical examination. It was only after the report of the psychological examination showed the author's mental age as that of a child between four and seven years that the Court was able to detect "mental underdevelopment" of the author. In consequence, the Court declared the author's appeal well-founded.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another international procedure of international investigation or settlement.

7.3 As to the requirement under article 5, paragraph 2 (b) of the Optional Protocol, the Committee notes that the State party has not submitted that the author failed to exhaust domestic remedies. As the State party does not raise any objections to the admissibility of the author's claims, the Committee declares the communication admissible and proceeds to the examination of the merits of the case.

8.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 With regard to the author's claim that his rights under article 9 have been violated, the Committee notes that his detention was lawful under Dutch law, section 26 of the Aliens Act. The Committee further notes that the author had his detention reviewed by the courts on two occasions, once 12 days after the beginning of his detention, and again 2 months later. On both occasions, the Court found that the author's continued detention was lawful, because he had evaded expulsion before, because there were doubts as to his identity, and because there were reasonable prospects for expulsion, as an identity investigation was still ongoing. The question remains therefore as to whether his detention was arbitrary. Recalling its previous jurisprudence[6] the Committee notes that "arbitrariness" must be interpreted more broadly than "against the law" to include elements of unreasonableness. Considering the author's flight from the open facility at which he was accommodated from the time of his arrival for around 11 months, the Committee considers that it was not unreasonable to have detained the author for a limited time until the administrative procedure relating to his case was completed. Once a reasonable prospect of expelling him no longer existed his detention was terminated. In the circumstances, the Committee finds that the author's detention was not arbitrary and thus not in violation of article 9 of the Covenant.

8.3 The author has raised a further claim against his detention insofar as it violated the State party's obligation under article 24 of the Covenant to provide special measures of protection to him as a minor. In this connection, while the author's counsel alleges that the issue of "mental underdevelopment" was raised before the State party's authorities, he does not specify the authorities before which the issue was raised. Moreover, the judgement of the Court concerning the lawfulness of the author's detention does not reveal that the issue was actually raised in Court during the proceedings. The State party has argued that there were doubts about the author's age, that it was not certain that he was a minor until the Court's judgement following the medical examination of 4 June 1997, and that in any event article 26 of the Aliens Act does not preclude the detention of minors. The Committee notes that apart from a statement that the author was detained, he does not provide any information on the type of detention facility in which he was accommodated, or his particular conditions of detention. In this respect, the Committee notes the State party's explanation that the detention of minors is applied with great restraint. The Committee further notes that the detention of a minor is not per se a violation of article 24 of the Covenant. In the circumstances of this case, where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor. The Committee therefore finds that the facts before it do not disclose a violation of article 24 (1) of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] On 15 October 1995, the immigration authorities recorded that the author was 15 years of age.

[2] It appears that the Aliens Department attempted to contact the author on 9 August 1996, but he had already fled.

[3] No further details on the type of detention facility or on the specific conditions of his detention have been provided.

[4] This information was provided by counsel after the initial submission to the Human Rights Committee.

[5] In his initial submission, the author also raised an allegation of a violation of article 10 but this is not maintained by the author in his submission of 16 December 1997 or in any subsequent submissions and was not responded to by the State party for this reason.

[6] Van Alpen v. The Netherlands, Case No. 305/1988. Views adopted on 23 July 1990, Suárez de Guerrero, Case No. 45/1979, Views adopted on 31 March 1982.

S. Communication No. 802/1998, Rogerson v. Australia (Views adopted on 3 April 2002, seventy-fourth session)*

Submitted by:	Mr. Andrew Rogerson (represented by Mr. John McCormack, barrister and solicitor in Darwin, Australia)
Alleged victim:	The author
State party:	Australia
Date of communication:	20 April 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 2002,

Having concluded its consideration of Communication No. 802/1998, submitted to the Human Rights Committee by Mr. Andrew Rogerson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Andrew Rogerson, an Australian citizen, currently residing in Willerby, United Kingdom. He claims to be the victim of violations by Australia of articles 2, paragraph 3 (a), (b); 14, paragraphs 1, 3 (a), (b), (c), (g) and 5; 15, paragraph 1; 17, paragraph 1; and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Under rule 84 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

1.2 The Covenant entered into force for the State party on 13 November 1980 and the Optional Protocol on 25 December 1991. The reservation entered by the State party upon its ratification of the Covenant has no relevance for the present case.

Facts as submitted by the author

2.1 The author was a barrister and solicitor of the Northern Territory Supreme Court and director of Lofta Pty. Ltd., a law firm, operating under the name of Loftus and Cameron. In July 1991, one Mr. Tchia, director of Tchia Nominees Pty. Ltd. and Kykym Pty. Ltd., instructed the author to assist him with certain aspects of development of land in Darwin. On 19 August 1992, Mr. Tchia cancelled the retainer and engaged other solicitors to do the same work. The author tried to resurrect the Loftus and Cameron retainer. On 24 August 1992, the author lodged a caveat on the land and threatened legal action for breach of contract. Over some weeks, the author had been attempting to meet with Mr. Tchia to discuss their relationship. The author, finally, succeeded to set up a meeting for 1 September 1992 at 5.00 p.m. On the same day at 11.34 a.m., the Northern Territory Supreme Court had heard an ex parte application by Mr. Tchia and, finally, granted an injunction to restrain the author from contacting or seeking to contact Mr. Tchia or any of the two companies, except through particular solicitors named in the order.

2.2 On 1 September at 4.50 p.m., Mr. Tchia's solicitors tried to serve the author, inter alia, the injunction and other documents relating to the originating motion. The author did not read the documents and immediately sent them back to the solicitors. The author knew that the documents pertained to a dispute between himself and Mr. Tchia, whom he was due to meet. The author decided not to read the documents but await Mr. Tchia's arrival; Mr. Tchia did not keep the appointment. Later the same day, the author met with one Mr. Riley, a business associate of Loftus and Cameron, and set out a settlement proposal to convey to Mr. Tchia. On 2 September at 10.30 a.m., Mr. Tchia's solicitors attempted again to serve the author the injunction at his office. However, the main door into the reception area was locked upon order of the author to prevent service by Mr. Tchia's solicitors. A woman at the front door stated that the author was not available and that she could not allow entry into the office. At about the same time, Mr. Riley met with Mr. Tchia; the latter rejected the author's settlement proposal and mentioned the injunction. On 2 September at 11.13 a.m., Mr. Tchia's solicitors tried to send the documents to the author by facsimile transmission. During the transmission the facsimile stopped transmitting and connection was lost.

2.3 From 2 to 4 and on 9 September 1992, the Northern Territory Supreme Court heard an action for contempt of court against the author. Since 3 September, the author was represented by counsel. On 9 October 1992, the Court delivered its decision finding the author guilty of contempt of court. The Court fined the author a sum of $5,000 and ordered him to pay the plaintiffs' costs on a solicitor and own client basis. Upon appeal of the author, heard from 22 to 24 March 1993, the Northern Territory Court of Appeals, on 17 March 1995, upheld the Supreme Court decision but quashed the fine and remitted this matter to the Supreme Court for reconsideration. On 22 June 1995, the High Court of Australia refused Special Leave to Appeal.

2.4 On 12 October 1992, the Law Society of the Northern Territory cancelled the author's practising certificate for an indefinite period.

2.5 On 6 May 1997, while the communication was already pending with the Committee, the Law Society of the Northern Territory commenced procedures to remove the author's name from the Roll of Legal Practitioners. The Supreme Court held hearings in the case on 4 December 1998 and 16 August 1999, and decided to strike the author off the Roll of Legal Practitioners. On 24 November 2000, the High Court of Australia refused the author's application for Special Leave to Appeal.

The complaint

3.1 The author claims that even though some of the violations of his rights had been ameliorated upon appeal, there still remains for him a destroyed career, broken health and de facto bankruptcy caused by an abuse of power by the judge of the Northern Territory Supreme Court in the action for contempt of court and the actions by the Law Society. The author submits that at the time of the trial he suffered from manic-depressive disorder and was unable to properly understand what was going on. The author submits that he was treated for this disease since November 1989.

3.2 With regard to the procedure at the Northern Territory Supreme Court hearing on contempt of court, the author contends that he was brought before the judge with less than one-hour notice, unrepresented. The author claims that the judge adopted an inquisitorial approach and assumed the role of prosecutor. The author claims that the judge violated articles 2, paragraph 2; 14, paragraphs 1 and 3 (a), (b), (g); 15, paragraph 1; 17; and 26 of the Covenant by his different actions during the trial. The author argues that the judge allowed the proceedings to continue, notwithstanding that they were in respect of an ex parte injunction, the sealed copy of which did not contain the required warning of imprisonment for failing to comply; that the author did not have proper notice of the terms of the order; that the author had not been served with a copy of the order; that in respect of the alleged contempt, it had never been particularized in a summons; that the author's attendance at court had been effected by means of a misleading fax. The author submits further that, during the trial, the judge waived the requirement for affidavit evidence so that the author had no advance warning of what his accusers were to say against him; the judge refused to allow adjournments, to enable the author's case to be properly prepared and, later in the proceedings, allow his counsel to take notice of what evidence had been given the previous day; the judge proceeded at an unseemly speed to hear the matter and produce a rapid decision convicting the author without hearing argument on the penalty and costs, which is an impossibility in law, as the proceedings should have been regarded as merely a form of execution in a civil action; and the judge made gratuitous and unfounded remarks on his fitness to practise law. Finally, the author claims that the Supreme Court failed to give effect to the decision of the Court of Appeals to reconsider the fine.

3.3 As to the procedure at the Northern Territory Court of Appeals, the author claims violations of articles 2, paragraph 1; 14, paragraph 1, 3 (c) and 5; and 26 of the Covenant. The author submits that it took the Court almost two years to hand down a decision. The author further points out that the decision was delivered by a two to one majority and that one of the majority judges refused a request to recuse himself on the grounds of bias against the author. The author submits that this judge knew him well and had, in the past, indicated opinions adverse to the author's interests.

3.4 As to the procedure at the High Court of Australia, the author claims violations of articles 2, paragraph 2 and 3; 14, paragraph 1 and 5; and 26 of the Covenant. The author argues that the restrictive approach of the Court to the granting of Special Leave does not appear to provide him with an effective remedy against injustice, as required by Australia's obligations under the Covenant. The author submits that the Solicitor General of the Northern Territory initially intended to support the application of the author; he later decided not to appear at the hearing after he had spoken privately to the Chief Justice of the High Court. The author claims that he had been prejudiced by the possible connivance between the most senior judge in Australia and the most senior law officer in the Northern Territory. The author is concerned by a comment by the Court that he, as a lawyer aware of the proceedings, did not suffer the injustice that a layperson may have done. The author claims that he is entitled to expect a fair trial regardless of his profession.

3.5 As to the procedure at the Law Society, the author claims violations of articles 14, paragraph 1; and 17 of the Covenant. The author argues that the Law Society is exercising quasi-governmental and judicial functions and is, therefore, bound to operate with due regard to human rights. The author submits that the Society proceeded without giving him a proper opportunity to be heard and without making any independent investigation that would have revealed the author's serious illness, but accepting the findings of the Supreme Court. The author argues that it is significant that the members of the Committee of the Law Society sitting in the small town of Darwin are, in large part, business competitors of the author and government lawyers with whom he clashed in the past. Furthermore, the author submits that the Society was bound to stipulate a period of time for which the Practicing Certificate would be withdrawn. The author claims that the procedures to strike him off the Roll of Practitioners are tantamount to a further, separate violation.

State party's observations on admissibility and merits

4.1 In a submission dated May 2000, the State party made its observations on the admissibility and merits of the communication. The State party submits that the author's claims are unsubstantiated for a variety of reasons summarized below.

4.2 With regard to the procedure before the Northern Territory Supreme Court, the State party argues that the author has not submitted evidence of partiality of the judge and has merely made generalized allegations concerning the conduct and result of the proceeding. The State party argues further that the fact that the author or his counsel did not raise the question of bias in the course of the proceedings is prima facie evidence that the conduct was acceptable in the circumstances. The State party contends that the author has failed to indicate the grounds on which the court could make an alternative finding on the question of his alleged contempt. The State party submits that the exercise of judicial function by the judge in the hearing on the ex parte order did not go to the matters at issue in the later proceedings regarding the contempt of court. Finally, since the author has not applied for a rehearing after the decision of the Court of Appeals, the penalty remains set aside.

4.3 The State party accepts that the court proceedings subject to this communication relate to criminal contempt and fall within the purview of article 14, paragraph 3, of the Covenant. The State party submits that, in fact, the author was aware of the factual and legal basis of the charge against him and had sufficient information to be able to defend himself properly. At no time did the author appear to question the speed of the proceedings on the basis that he was unprepared and needed further time and facilities to prepare for the proceedings. The State party refers to the Committee's decision in Karttunen v. Finland[1] and submits that any deficiency of the first instance procedure was cured by the proceedings before the Appeals Court. With regard to the alleged violation of article 14, paragraph 3 (g), of the Covenant, the State party submits that the judge encouraged the author to provide an explanation for the events after the issuance of the ex parte order, rather than to testify against himself. At all times, the author had the option to remain silent. With regard to article 15, paragraph 1, the State party submits that on the factual basis established by the Supreme Court, i.e. wilful disobedience of the court order, a conviction of criminal contempt was justified. At all relevant times, the offence of criminal contempt existed in the Northern Territory. With regard to article 17, paragraph 1, the State party submits that the author failed to substantiate sufficiently his claim that the Supreme Court judge unlawfully attacked his honour and reputation. With regard to the alleged discrimination of the author on the basis of his alleged disabling illness, the State party submits that there was no mention in any document or transcript that an illness meant he could not understand the proceedings and it was neither raised orally or by affidavit in any of the subsequent court proceedings. The author was, furthermore, in every aspect treated as any other person in his situation would have been treated.

4.4 With regard to the procedure before the Northern Territory Court of Appeals, the State party submits that the allegation of bias through previous personal and professional association cannot be accepted, given its general nature and complete lack of supporting evidence. The judge's written decision indicates that he fully considered the application of the author's counsel in relation to apprehension of bias. The State party submits further that the two years the Court took to deliver its judgement is not an unreasonable time. Since the appeal was based on law rather than facts and the Law Society has already withdrawn the author's practising certificate on the basis of the facts established by the Supreme Court, the delay did not affect the author's ability to practise law. Furthermore, the circumstances before the Court in the appeal warranted detailed and careful consideration so that two years was not unreasonable.

4.5 With regard to the procedure before the High Court of Australia, the State party submits that the mere fact that the result of the Special Leave application was not favourable to the author is not in itself evidence that supports his allegation that he was denied equal access to court. The State party argues that the author's application failed on the reasonable and legitimate grounds that it did not raise a matter of public or legal importance. The State party submits that the telephone conversation between the Northern Territory Solicitor General and the Chief Justice was a routine collegial discussion that raises no doubts as to the impartiality of the High Court. With regard to the alleged discrimination against the author by the High Court and the Court of

Appeals on the basis of his occupation as a lawyer, the State party submits that neither of these courts nor the Supreme Court based a decision on the state of the author's knowledge solely because of his occupation.

4.6 With regard to the procedure before the Law Society of the Northern Territory, the State party submits that the author has given no grounds for bias of any particular member of the Council, but only made a sweeping and unfounded generalization. The State party submits further, that the exercise of the power of the Law Society to cancel the author's practising certificate is not a "suit at law" within the meaning of article 14, paragraph 1, of the Covenant. In any case, the author must be considered to have waived his right to the oral hearing offered by the Law Society after he refused twice to attend. With regard to the alleged violation of article 17, paragraph 1, of the Covenant, the State party submits that the author has failed to address how the withdrawal of his practising certificate is an unlawful attack on honour and reputation within the terms of that provision. In any case, the decision of the Law Society was not unlawful at domestic law and did not constitute an attack.

Comments by the author

5.1 The author claims that the State party caused further prejudice to him by taking two years and five months to reply to the Committee. The author submits additional complaints with regard to developments that occurred while his communication was already pending with the Committee (see paragraph 2.5).

5.2 The author submits additional details with regard to his previous claims. With regard to his mental illness, the author states that affidavits were placed before the court and the matter was raised before the High Court. Furthermore, the author claims that his deranged behaviour and disingenuous lying were indicative of his poor mental state at the time of the contempt action at the Supreme Court. As to the procedure at the Northern Territory Supreme Court, the author claims that the judge was not impartial. The author refers to a decision of the Court of Appeals, of 12 May 1997, finding that a trial judge in the case in which two jurors were accused of contempt should not have presided over the hearing against them for contempt. Therefore, the same judge granting the ex parte order should not have presided over the trial in regard to its breach. With regard to the alleged delay of the Appeals Court to deliver its decision the author submits that because he could not get back his practice certificate unless the Court had ruled on his appeal, the speedy dispatch of the appeal was essential.

5.3 With regard to the procedure before the Supreme Court regarding his being struck off the Roll of Legal Practitioners, the author claims that he did not receive a fair hearing by an impartial tribunal under article 14, paragraph 1, of the Covenant. The author argues that the Chief Justice of the Court was partial, because he decided earlier on the appeal of the author against the contempt conviction. Furthermore, the author lists examples of the behaviour of the judge during the trial that should indicate that he was biased. The author claims further that he was denied proper opportunity of being present in person to present his case; that his counsel was incompetent and deceiving the court; that the evidence relied on was inadmissible; that the proceedings were defective; and that domestic law was applied incorrectly. With regard to the procedure before the High Court of Australia regarding his being struck off the Roll of Legal

Practitioners, the author claims that his right to appeal was violated as the wrongful decision was not removed, thus entailing a violation of article 14, paragraph 1, and article 2, paragraphs 2 and 3 (a), (b), of the Covenant. The author submits further that the High Court lacked impartiality and discriminated against him by virtue of his status as a former legal practitioner. As the appeal, therefore, failed to cure the violations of the first instance procedure, the violations continue.

Additional comments by the State party

6.1 In its submission dated September 2001, the State party comments on the new claims of the author arising from the court proceedings with regard to the author's removal from the Roll of Legal Practitioners. The State party submits that the author's claims are unsubstantiated for a variety of reasons summarized below.

6.2 With regard to the Northern Territory Supreme Court proceedings, the State party submits that the author had enough time to prepare for the hearing of 16 August 1999, as the proceedings commenced already on 6 May 1997 and had been adjourned on 4 December 1998; the date for the hearing on 16 August 1999 was set in April 1999. The State party claims that it cannot be held responsible for the failure of the author and his attorney to maintain proper contacts. In fact, an experienced lawyer, who was familiar with the case, represented the author in both hearings. Furthermore, it was not manifest to either the Supreme Court or the High Court of Australia that the behaviour of the author's attorney was incompatible with the interests of justice. The State party submits that the author has failed to demonstrate that the introduction as evidence of the Supreme Court's findings of contempt and the alleged deficient procedure lead to a breach of article 14, paragraph 1, of the Covenant, as this question concerns only the application of domestic law. This argument can also not be used as evidence of bias of the presiding judge.

6.3 With regard to the High Court proceedings, the State party submits that article 2 of the Covenant can only be invoked in relation with any other substantive provision of the Covenant. In the opinion of the State party, an avenue of appeal was available for the author and the ultimate dismissal of his submissions is no evidence of a breach of article 14, paragraph 1, of the Covenant. The State party submits that the author was not discriminated against, as the disciplinary procedures to which he was subject are justifiable on reasonable and objective criteria. Furthermore, the transcript of the proceeding does not offer any evidence that the High Court treated the author differently from any other legal practitioner appealing a decision of a disciplinary tribunal. The State party submits that article 14, paragraph 1, of the Covenant does not provide a right to an appeal. Finally, the State party submits that the author did not provide any evidence that would support a finding that the judge was biased.

Issues and proceedings before the Committee

Consideration of the admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 As to the author's claim that already at the time of the trial at the Northern Territory Supreme Court on contempt of court he suffered from manic-depressive disorder and was unable properly to understand what was going on (art. 14, para. 1), the Committee recalls that pursuant to article 5, paragraph 2 (b), of the Optional Protocol, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that it does not appear from the information before it that the author claimed to be a person under a disability at any point during the contempt procedure. This part of the communication is, therefore, inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The Committee notes the author's allegations that the Northern Territory Supreme Court and the High Court of Australia lacked impartiality, as provided for in article 14, paragraph 1, when deciding on his conviction of contempt and, later, when deciding on his removal from the Role of Legal Practitioners. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter before them, and they must not act in ways that promote the interests of one of the parties.[2] In the present case, the author has failed to substantiate, for the purposes of admissibility, that the judges were biased, when hearing his case. This part of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

7.5 As to the author's allegations of violations of article 14, paragraph 5, of the Covenant by the Northern Territory Court of Appeals and the High Court of Australia when reviewing his appeal of the finding of contempt, the Committee notes that this provision guarantees a right to an appeal "according to law". The Committee recalls its previous jurisprudence that a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review of the conviction and sentences and as long as the procedure allows for due consideration of the nature of the case.[3] Thus, in the circumstances, the Committee finds that this claim is inadmissible under article 2 of the Optional Protocol.

7.6 The Committee notes the argument of the author that the Law Society of the Northern Territory violated his right to a fair trial as provided for in article 14, paragraph 1, of the Covenant when, in its procedures to cancel the practising license, it relied only on the previous finding of the Northern Territory Supreme Court, instead of carrying out its own investigation that would have revealed the author's alleged illness. The Committee recalls its previous jurisprudence that the regulation of the activities of professional bodies and the scrutiny of such relations by the courts may raise issues in particular under article 14 of the Covenant.[4] However, the binding effect of court decisions on the Law Society's considerations of the cancellation of a practising certificate is primarily a matter of application of domestic law that the Committee cannot review unless it is manifest that it was arbitrary or amounted to a denial of justice. Therefore, the Committee finds that the author has failed to substantiate this claim, for purposes of admissibility, and this claim is accordingly inadmissible under article 2 of the Optional Protocol.

7.7 As to the author's allegations of violations of article 17, paragraph 1, of the Covenant with regard to the procedure at the Northern Territory Supreme Court on contempt of court and with regard to the subsequent procedure at the Legal Society of the Northern Territory on the cancellation of the author's Practising Certificate, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the remarks by the judge and the procedure against him constituted an arbitrary or unlawful attack on his honour and reputation (see paragraphs 3.2 and 3.5). In this respect, accordingly, the author has no claim within the meaning of article 2 of the Optional Protocol.[5]

7.8 In relation to the author's claim of discrimination against him by virtue of his status as a former legal practitioner in all court procedures in violation of article 26 of the Covenant, the Committee considers that the author has failed to substantiate, for the purposes of admissibility, that he was treated differently from other lawyers in a comparable situation. Therefore, the Committee finds that this claim is inadmissible under article 2 of the Optional Protocol.

7.9 The Committee notes the author's allegations of a violation of article 2, paragraph 2, of the Covenant with regard to the procedure of the Northern Territory Supreme Court on contempt of court, of article 2, paragraph 1, with regard to the procedure of the Court of Appeals on contempt of court and of article 2, paragraph 3, with regard to the procedure of the High Court on contempt of court and his removal from the Roll of Legal Practitioners (See paragraphs 3.2 to 3.4 and 5.3). The Committee observes that the provisions of article 2 of the Covenant, which lay down general obligations for State parties, cannot, in isolation, give rise to a claim in a communication under the Optional Protocol.[6] The Committee considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.

7.10 As to the author's allegations with regard to the procedure before the Northern Territory Supreme Court and the High Court of Australia on contempt of court and, later, on his strike-off the Roll of Legal Practitioners, the Committee notes that the author's claims with regard to the content and serving of the injunction order, the judge's conduct of procedures and their procedural decisions refer to the application of domestic law (see paragraphs 3.2 and 5.3). The Committee refers to its established jurisprudence that interpretation of domestic legislation is essentially a matter for the courts and authorities of the State party.[7] Since it does not appear from the information before the Committee that the law in the present case was interpreted and applied arbitrarily or that its application amounted to a denial of justice, the Committee considers that the communication is inadmissible under article 3 of the Optional Protocol in this regard.

8. The Committee considers that the remainder of the communication may raise issues under articles 14, paragraphs 1 and 3; and 15, paragraph 1, of the Covenant. Consequently, the Committee declares this part of the communication admissible and proceeds to the examination of the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all information made available by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 With respect to the alleged violations of article 14, paragraphs 3 (a), (b) and (g) by the Northern Territory Supreme Court in the procedure on contempt of court, the Committee observes that this provision applies only to criminal proceedings. The Committee notes that the State party submitted that the proceedings that are subject to the present communication relate to criminal contempt and accepted that they fall within the purview of article 14, paragraph 3, of the Covenant. However, the Committee notes that the author's claims in this regard had been subject to review by the Northern Territory Court of Appeal and the High Court of Australia and that the author does not raise the same claims with regard to the appellate procedures. The Committee recalls that it is possible for appellate instances to correct any irregularities of proceedings before lower court instances.[8] Therefore, the Committee is unable to conclude on the basis of the information before it that article 14, paragraphs 3 (a), (b) and (g) has been violated.

9.3 The Committee notes the author's claim that the procedure at the Northern Territory Court of Appeals on contempt of court violated his right to a fair hearing provided for in article 14, paragraph 3 (c), of the Covenant, because it delivered its decision with delay. The Committee notes that the Court heard the appeal of the author from 22 to 24 March 1993. The Committee notes further that the two puisne judges delivered their draft decisions on 28 April and 27 July 1993, respectively; on 17 March 1995, the Court dismissed the author's case. The State party has not explained what happened in the author's case between these dates, notwithstanding the existence of a case management system. The Committee finds that in the circumstances of the present case a delay of almost two years to deliver the final decision violates the right of the author to be tried without undue delay as provided for in article 14, paragraph 3 (c), of the Covenant.

9.4 With respect to the alleged violation of article 15, paragraph 1, of the Covenant by the Northern Territory Supreme Court in the procedures on contempt, the Committee considers that the term "criminal offence" has to be interpreted in conformity with the term "criminal charge" in article 14, paragraph 3, and, thus, finds that article 15, paragraph 1, is applicable in the present case.[9] The Committee notes that it appears from the submissions of both parties that, before the author was convicted, contempt of court for breach of an injunction order already constituted an offence under Australian law.[10] Therefore, the Committee finds that the facts of the case do not reveal a violation of article 15, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 14, paragraph 3 (c), of the Covenant.

11. The Committee considers that its finding of a violation of the rights of the author under article 14, paragraph 3 (c), of the Covenant constitutes sufficient remedy.

12. On becoming a State party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established.

The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Case No. 387/1989, Views adopted on 23 October 1992, para. 7.3.

[2] Karttunen v. Finland, Case No. 387/1989, Views of 23 October 1992, para. 7.2.

[3] Lumley v. Jamaica, Case No. 662/1995, Views of 31 March 1999, para. 7.3.

[4] See J.L. v. Australia, Case No. 491/1992, decision of 28 July 1992, para. 4.3.

[5] See R.L.M. v. Trinidad and Tobago, Case No. 380/1989, decision of 16 July 1993; Simons v. Panama, Case No. 460/1991, decision of 25 October 1994.

[6] C.E.A. v. Finland, Case No. 316/1988, decision of 10 July 1991, para. 6.2.

[7] See, inter alia, Maroufidou v. Sweden, Case No. 58/1979, Views adopted on 9 April 1981, para. 10.1.

[8] Karttunen v. Finland, Case No. 387/1989, Views of 23 October 1992, para. 7.3.

[9] See the similar case of J.L. v. Australia, Case No. 491/1992, decision of 28 July 1992, para. 4.3.

[10] See Westerman v. The Netherlands, Case No. 682/1996, Views of 3 November 1999.

T. Communication No. 845/1998, Kennedy v. Trinidad and Tobago (Views adopted on 26 March 2002, seventy-fourth session)*

Submitted by:	Mr. Rawle Kennedy (represented by counsel, Mr. Saul Lehrfreund, Saul Simons Muirhead and Burton)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	7 December 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2002,

Having concluded its consideration of Communication No. 845/1998, submitted to the Human Rights Committee by Mr. Rawle Kennedy under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Rawle Kennedy, a citizen of Trinidad and Tobago, at the time of submission awaiting execution under a sentence of death, which was subsequently commuted. He is currently serving a sentence of 75 years' imprisonment[1] in the State prison of Port-of-Spain. He claims to be a victim of violations by Trinidad and Tobago of articles 2, paragraph 3; 6, paragraphs 1, 2 and 4; 7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraphs 1, 3 (c) and 5; and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following Committee members participated in the adoption of the present decision: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of an individual opinion signed by Committee members, Mr. Nisuke Ando, Mr. Eckart Klein and Mr. David Kretzmer, and the text of an individual (concurring) opinion signed by Mr. David Kretzmer and Mr. Maxwell Yalden are appended to the present document.

The facts as submitted by the author

2.1 On 3 February 1987, one Norris Yorke was wounded in the course of a robbery of his garage. He died of the wounds the following day. The author was arrested on 4 February 1987, charged with murder along with one Wayne Matthews on 9 February 1987, and brought before a magistrate on 10 February 1987. He was tried from 14 to 16 November 1988 and found guilty as charged. On 21 January 1992, the Court of Appeal ordered a retrial, which took place between 15 and 29 October 1993. The author was again found guilty and sentenced to death. A new appeal was subsequently lodged, but on 26 January 1996, the Court of Appeal refused leave to appeal, providing its reasons on 24 March 1998. On 26 November 1998, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal as a poor person.

2.2 The prosecution's case was that Norris Yorke had been at work in his gasoline station along with the supervisor, one Ms. Shanghie, in the evening of 3 February 1987. While Mr. Yorke was checking the cash from the day's sale, the author and Mr. Matthews entered the station. The prosecution claimed that the author asked Ms. Shanghie for a quart of oil, and that when she returned, she found Mr. Yorke headlocked by the author, with a gun pointing to his forehead. Matthews allegedly told the author that Mr. Yorke was reaching for a gun, dealt Mr. Yorke several blows to the head with a piece of wood and left the room. Mr. Yorke then told the intruders to take the money. Ms. Shanghie, on Mr. Yorke's proposal, threw a glass at Matthews upon which the author pointed the gun at her and told her to be quiet. Matthews ran and hit Mr. Yorke on the head a second time causing him to slump down. The two intruders thereafter escaped with the money, in a vehicle belonging to Mr. Yorke. The next day Mr. Yorke died from the head wounds.

2.3 All available domestic remedies are said to have been exhausted for the purposes of article 5, paragrapn 2 (b), of the Optional Protocol. While a constitutional motion might be open to the author in theory, it is not available in practice because of the State party's unwillingness or inability to provide legal aid for such motions and the difficulty of finding a local lawyer who would represent an applicant pro bono in a constitutional motion.

The complaint

3.1 The author argues that article 9, paragraphs 2 and 3, was violated, as he was not informed of charges against him until five days after his arrest and was not brought before a magistrate until six days after his arrest. Counsel recalls that the Covenant requires that such actions be undertaken "promptly", and submits that the periods between arrest and charges in his case do not meet that test.

3.2 The author claims to be a victim of a violation of article 14, paragraphs 3 (c) and 5, on the ground of undue delays in the proceedings. He recalls that it took (1) 21 months from the date on which the author was charged until the beginning of his first trial, (2) 38 months from the conviction until the hearing of his appeal, (3) 21 months from the decision of the Court of Appeal to allow his appeal until the beginning of the retrial, (4) 27 months from the second conviction to the hearing of the second appeal, and (5) 26 months from the hearing of the second appeal until the reasoned judgement of the Court of Appeal was delivered. Counsel argues that there is no reasonable excuse as to why the retrial took place some six years after the offence and why the Court of Appeal took a further four years and four months to determine the matter, and submits that the State party must bear the responsibility for this delay.

3.3 The author claims violations of articles 6, 7, and 14, paragraph 1, on account of the mandatory nature of the death penalty for murder in Trinidad and Tobago. He recalls that the distinction between capital and non-capital murder, which exists in law in many other common law countries,[2] has never been applied in Trinidad and Tobago.[3] It is argued that the stringency of the mandatory death penalty for murder is exacerbated by the Murder/Felony Rule in Trinidad and Tobago, under which a person who commits a felony involving personal violence does so at his own risk, and is guilty of murder if the violence results even inadvertently in the death of the victim. The application of the Murder/Felony Rule, it is submitted, is an additional and harsh feature for secondary parties who may not have participated with the foresight that grievous bodily harm or death could possibly result from that robbery.

3.4 It is submitted that, given the wide variety of circumstances under which murder may be committed, a sentence indifferently imposed on every category of murder, does not retain a proportionate relationship between the circumstances of the actual crime and the punishment and therefore becomes cruel and unusual punishment contrary to article 7 of the Covenant. It is similarly submitted that article 6 was violated, since to impose the death penalty irrespective of the circumstances of the crime constituted cruel, inhuman and degrading, and an arbitrary and disproportionate punishment which cannot justify depriving someone of the right to life. In addition, it is submitted that article 14, paragraph 1, was violated because the Constitution of Trinidad and Tobago does not permit the author to allege that his execution is unconstitutional as inhuman or degrading or cruel treatment, and because it does not afford the right to a judicial hearing or a trial on the question whether the death penalty should be imposed or carried out for the particular murder committed.

3.5 It is submitted that the imposition of the death penalty without consideration and opportunity for presentation of mitigating circumstances was particularly harsh in the author's case, as the circumstances of his offence were that he was a secondary party to the killing and thus would have been considered less culpable. Counsel makes reference to a Bill to Amend the Offences Against the Persons Act, which has been considered but never enacted by the Trinidadian Parliament. According to counsel, the author's offence would have fallen clearly within the non-capital category, had this bill been passed.

3.6 The author claims to be a victim of a violation of article 6, paragraphs 2 and 4, on the ground that the State party has not provided him with the opportunity of a fair hearing in relation to the exercise of the prerogative of mercy. In Trinidad and Tobago, the President has the power to commute any sentence of death under section 87 of the Constitution, but he must act in accordance with the advice of a Minister designated by him, who in turn acts pursuant to the advice of the Prime Minister. Under section 88 of the Constitution, there shall be an Advisory Committee on the Power of Pardon, chaired by the designated Minister. Under section 89, the Advisory Committee must take into account certain materials, such as the trial judge's report, before tendering its advice. Counsel submits that in the practice of Trinidad and Tobago, the Advisory Committee has the power to commute death sentences, and it is free to regulate its own procedure; but in doing so, it does not have to afford the prisoner a fair hearing or have regard to any other procedural protection for an applicant, such as a right to make written or oral submissions or to have the right to be supplied with the material upon which the Advisory Committee will make its decision.[4]

3.7 For counsel, the right to apply for mercy under article 6, paragraph 4, must be interpreted to be an effective right, i.e. it must be construed in such a way that it is practical and effective rather than theoretical or illusory. It must thus afford the following procedural rights to a person applying for mercy:

- The right to notification of the date on which the Advisory Committee is to consider the case;
- The right to be supplied with the documentation before the Advisory Committee at the hearing;
- The right to make representations in advance of the hearing both generally and with regard to the material before the Advisory Committee;
- The right to an oral hearing before the Advisory Committee;
- The right to place before the Advisory Committee, and have it considered, the findings and recommendations of any international body, such as the United Nations Human Rights Committee.

3.8 Counsel notes that in the author's case, the Advisory Committee may have met several times to consider the author's application without his knowledge, and may yet decide to reconvene, without notifying him, without giving him an opportunity to make representations and without supplying him with the material to be considered. Counsel argues that this constitutes a violation of article 6, paragraph 4, as well as article 6, paragraph 2, as the Advisory Committee can only make a reliable determination of which crimes constitute "the most serious crimes" if the prisoner is allowed to participate fully in the decision-making process.

3.9 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, as he was tortured and beaten by police officers after his arrest, whilst awaiting to be charged and brought before a magistrate. He allegedly suffered repeated beatings and was tortured to admit to the offence. He notes that he was hit on the head with a traffic sign, jabbed in the ribs with a rifle butt, stamped on by named police officers, struck in the eyes by a named police officer, threatened with a scorpion and drowning, and denied food. The author complained about the beatings and showed his bruises to the magistrate before whom he was brought on 10 February 1987, and the judge ordered that he be taken to hospital after the hearing.

3.10 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, on the ground that he was detained in appalling conditions both on remand and on death row. Thus, for the duration of the periods on remand (21 months before the first trial and 21 months before the second trial), the author was kept in a cell measuring 6 by 9 feet, shared with between 5 to 10 other detainees. With regard to the period of altogether almost eight years on death row, it is submitted that the author has been subjected to solitary confinement in a cell measuring 6 by 9 feet, containing only a steel bed, table and bench, with no natural light or integral sanitation and only a plastic pail for use as a toilet. The author states that he is allowed out of his cell only once a week for exercise, that the food is inadequate and almost inedible and that no provisions are made for his particular dietary requirements. Medical and dental care is, despite requests, infrequently made available.

3.11 In view of paragraph 3.10 above, the author claims that carrying out the death sentence would constitute a violation of his rights under articles 6 and 7. Reference is made to the Judicial Committee's judgement in Pratt and Morgan, in which it was held that prolonged detention under sentence of death would violate, in that case, Jamaica's constitutional prohibition on inhuman and degrading treatment. Counsel argues that the same arguments apply in the present case.

3.12 Finally, the author claims a violation of articles 2, paragraph 3, and 14, paragraph 1, since because of the lack of legal aid he is de facto being denied the right to apply to the High Court for redress of violations of fundamental rights. He notes that the costs of instituting proceedings in the High Court are far beyond his own financial means and beyond the means of most of those charged with capital offences.

3.13 With regard to the State party's reservation made upon re-accession to the Optional Protocol on 26 May 1998, it is argued that the Committee has competence to deal with the communication notwithstanding the fact that it concerns a "prisoner who is under sentence of death in respect of [... matters] relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him".

The State party's submission and author's comments

4.1 By submission of 8 April 1999, the State party refers to its instrument of accession to the Optional Protocol of 26 May 1998, which included the following reservation:

> "... Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith."

4.2 The State party submits that because of this reservation and the fact that the author is a prisoner under sentence of death, the Committee is not competent to consider the present communication. It is stated that in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect.

5. In his comments of 23 April 1999, the author submits that the State party's claim that the Committee exceeded its jurisdiction in registering the present communication is wrong as a matter of international law. It is argued that, in conformity with the general principle that the body to whose jurisdiction a purported reservation is addressed decides on the validity and effect of that reservation, it must be for the Committee, and not the State party, to determine the validity of the purported reservation. Reference is made to the Committee's General Comment No. 24, paragraph 18,[5] and to the Order of the International Court of Justice of 4 December 1998 in Fisheries Jurisdiction (Spain v. Canada).

The Committee's admissibility decision

6. At its sixty-seventh session, the Committee considered the admissibility of the communication. It decided that the reservation could not be deemed compatible with the object and purpose of the Optional Protocol, and that accordingly the Committee was not precluded from considering the communication under the Optional Protocol. The Committee noted that the State party had not challenged the admissibility of any of the author's claims on any other ground than its reservation and considered that the claims were sufficiently substantiated to be considered on the merits. On 2 November 1999, the Human Rights Committee therefore declared the communication admissible.[6]

Consideration of the merits

7.1 The State party's deadline for the submission of information on the merits of the author's allegations expired on 3 July 2000. No pertinent information has been received from the State party, in spite of two reminders addressed to it on 28 February 2001 and 13 August 2001.

7.2 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.3 Counsel has claimed that the mandatory character of the death sentence, and its application in Mr. Kennedy's case, constitutes a violation of articles 6 (1), 7 and 14 (1) of the Covenant. The State party has not addressed this claim. The Committee notes that the mandatory imposition of the death penalty under the laws of Trinidad and Tobago is based solely on the particular category of crime of which the accused person is found guilty. Once that category has been found to apply, no room is left to consider the personal circumstances of the accused or the particular circumstances of the offence. In the case of Trinidad and Tobago, the Committee notes that the death penalty is mandatory for murder, and that it may be and in fact must be imposed in situations where a person commits a felony involving personal violence and where this violence results even inadvertently in the death of the victim. The Committee considers that this system of mandatory capital punishment would deprive the author of his right to life, without considering whether, in the particular circumstances of the case, this exceptional form of punishment is compatible with the provisions of the Covenant.[7] The Committee accordingly is of the opinion that there has been a violation of article 6, paragraph 1, of the Covenant.

7.4 The Committee has noted counsel's claim that since Mr. Kennedy was at no stage heard in relation to his request for a pardon nor informed about the status of deliberations on this request, his right under article 6, paragraph 4, of the Covenant, was violated. In other words, counsel contends that the exercise of the right to seek pardon or commutation of sentence should be governed by the procedural guarantees of article 14 (see paragraph 3.8 above). The Committee observes, however, that the wording of article 6, paragraph 4, does not prescribe a particular procedure for the modalities of the exercise of the prerogative of mercy. Accordingly, States parties retain discretion for spelling out the modalities of the exercise of the rights under article 6, paragraph 4. It is not apparent that the procedure in place in Trinidad and Tobago and the modalities spelled out in sections 87 to 89 of the Constitution are such as to effectively negate the right enshrined in article 6, paragraph 4. In the circumstances, the Committee finds no violation of this provision.

7.5 In connection with counsel's claim that the length of judicial proceedings in his case amounted to a violation of article 14, paragraphs 3 (c) and 5, the Committee notes that more than 10 years passed from the time of the author's trial to the date of the dismissal of his petition for special leave to appeal by the Judicial Committee of the Privy Council. It considers that the delays invoked by counsel (see paragraph 3.2 above), in particular the delays in judicial proceedings after the ordering of a retrial, i.e. over six years from the ordering of the retrial in early 1992 to the dismissal of the second appeal in March 1998, were "unreasonable" within the meaning of article 14, paragraphs 3 (c) and 5, read together. Accordingly, the Committee concludes to a violation of these provisions.

7.6 The author has alleged violations of article 9, paragraphs 2 and 3, because he was not charged until five days after his arrest, and not brought before a judge until six days after arrest. It is uncontested that the author was not formally charged until 9 February 1987 and not brought before a magistrate until 10 February 1987. While the meaning of the term "promptly" in paragraphs 2 and 3 of article 9 must be determined on a case-by-case basis, the Committee recalls its jurisprudence under the Optional Protocol pursuant to which delays should not exceed a few days. While the information before the Committee does not enable it to determine whether Mr. Kennedy was "promptly" informed of the charges against him, the Committee considers that in any event he was not brought "promptly" before a judge, in violation of article 9, paragraph 3.

7.7 The Committee has noted the author's allegations of beatings sustained after arrest in police custody. It notes that the State party has not challenged these allegations; that the author has provided a detailed description of the treatment he was subjected to, further identifying the police officers allegedly involved; and that the magistrate before whom he was brought on 10 February 1987 ordered him to be taken to hospital for treatment. The Committee considers that the treatment Mr. Kennedy was subjected to in police custody amounted to a violation of article 7 of the Covenant.

7.8 The author claims that his conditions of detention are in violation of articles 7 and 10 (1). Once again, this claim has not been addressed by the State party. The Committee notes that the author was kept on remand for a total of 42 months with at least 5 and up to 10 other detainees in a cell measuring 6 by 9 feet; that for a period of almost eight years on death row, he was subjected to solitary confinement in a small cell with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once a week, and with wholly inadequate food that did not take into account his particular dietary requirements. The Committee considers that these - uncontested - conditions of detention amount to a violation of article 10, paragraph 1, of the Covenant.

7.9 The Committee has noted the claim (see paragraph 3.11 above) that the execution of the author would amount to a violation of articles 6 and 7 of the Covenant. It considers, however, that this particular claim has become moot with the commutation of the author's death sentence.

7.10 The author finally claims that the absence of legal aid for the purpose of filing a constitutional motion amounts to a violation of article 14, paragraph 1, read together with article 2, paragraph 3. The Committee notes that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in *all* cases but only in the determination of a criminal charge where the interests of justice so require (art. 14 (3) (d)). It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court, provided for under section 14 (1) of the Trinidadian Constitution, available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court, in relation to his claim of a violation of his right to a fair trial, the Committee considers that the denial of legal aid constituted a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by Trinidad and Tobago of articles 6, paragraph 1, 7, 9, paragraph 3, 10, paragraph 1, 14, paragraphs 3 (c) and 5, and 14, paragraphs 1 and 3 (d), the latter in conjunction with article 2, paragraph 3, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Rawle Kennedy with an effective remedy, including compensation and consideration of early release. The State party is under an obligation to take measures to prevent similar violations in the future.

10. The Committee is aware that Trinidad and Tobago has denounced the Optional Protocol. The present case however was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol, it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] On an unspecified date after expiry of the five-year period set by the Privy Council as a threshold for commutation of death sentences, the author's death sentence was commuted to a sentence of 75 years' imprisonment. The author was so informed on 8 February 2000.

[2] Reference is made to the United Kingdom's Homicide Act 1957, which restricted the death penalty to the offence of capital murder (murder by shooting or explosion, murder committed in the furtherance of theft, murder committed for the purpose of resisting arrest or escaping from custody, and murders of police and prison officers on duty) pursuant to section 5, and murder committed on more than one occasion pursuant to section 6.

[3] The law in Trinidad and Tobago does contain provisions reducing the offence of murder to manslaughter where murder was committed with diminished responsibility or under provocation.

[4] Counsel invokes the principles set down by the Judicial Committee in Reckley v. Minister of Public Safety (No. 2) (1996) 2WLR 281 and De Freitas v. Benny (1976) A.C.

[5] I/GEN HR/1/Rev.3, 15 August 1997, p. 48.

[6] For the text of the decision, see the Annual Report of the Human Rights Committee for 2000, A/55/40, vol. II, annex XI.A.

[7] Views on Communication No. 806/1998 (Thompson v. St. Vincent and the Grenadines), adopted on 18 October 2000, paragraph 8.2 (A/56/40, vol. II, annex X.H.).

APPENDIX

Individual opinion of Committee members Mr. Nisuke Ando, Mr. Eckart Klein and Mr. David Kretzmer

When the Committee considered the admissibility of this communication we were of the opinion that in the light of the State party's reservation quoted in paragraph 4.1 of the Committee's Views the Committee was not competent to consider the communication and it should therefore be declared inadmissible. Our view was not accepted by the Committee, which held that it was competent to consider the communication. We respect the Committee's view as to its competence and so have joined in considering the communication on the merits.

(Signed) Nisuke Ando

(Signed) Eckart Klein

(Signed) David Kretzmer

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee members Mr. David Kretzmer and Mr. Maxwell Yalden (concurring)

In Communication No. 806/1998 (Thompson v. St. Vincent and the Grenadines), I dissented from the Committee's view that the mandatory nature of the death sentence for murder according to the law of the State party necessarily meant that by sentencing the author to death the State party had violated article 6 (1) of the Covenant. One of the main grounds for my opinion was that according to the law of the State party the death penalty was mandatory only in the case of the intentional killing of another human being, a penalty which, while deeply repugnant to the undersigned, was not in our view in violation of the Covenant. In the present case which carries a mandatory death sentence, however, it has been shown that the definition of murder, may include participation in a crime which involves violence that results inadvertently in the death of another. Furthermore, the prosecution in this case did not claim that the author had intentionally killed Norris Yorke.

In these circumstances, it is not self-evident that the author was convicted of a most serious crime, which is a condition for imposing the death sentence under article 6, paragraph 2, of the Covenant. Furthermore, the mandatory nature of the sentence denied the court the opportunity of considering whether the specific crime of the author was indeed a most serious crime, within the meaning of article 6, paragraph 2. I am therefore of the opinion that in imposing a death sentence the State party violated the author's right to life protected under article 6, paragraph 2, of the Covenant.

(Signed) David Kretzmer

(Signed) Maxwell Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

U. Communication No. 848/1999, Rodríguez Orejuela v. Colombia (Views adopted on 23 July 2002, seventy-fifth session)*

Submitted by:	Mr. Miguel Ángel Rodríguez Orejuela (represented by counsel, Mr. Pedro Pablo Camargo)
Alleged victim:	The author
State party:	Colombia
Date of communication:	16 September 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 2002,

Having concluded its consideration of Communication No. 848/1999, submitted by Mr. Miguel Ángel Rodríguez Orejuela under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Miguel Ángel Rodríguez Orejuela, a Colombian citizen currently being held at La Picota General Penitentiary in Colombia for the offence of drug trafficking. He claims to be a victim of the violation by Colombia of article 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 Mr. Miguel Ángel Rodríguez Orejuela was charged with, among other activities, the offence of engaging in drug trafficking on 13 May 1990. The Bogotá Prosecution Commission, which was established by resolution of the Office of the Public Prosecutor, adopted in accordance with article 250 of the 1991 Constitution of Colombia, was given responsibility for conducting the proceedings as from 1993 and bringing the charge against him.

2.2 In a judgement handed down by the Bogotá Regional Court on 21 February 1997, the author was sentenced to 23 years' imprisonment and a fine. He appealed against the sentence before the National Court, which, in a judgement of 4 July 1997, upheld the conviction at first instance but reduced the sentence to 21 years' imprisonment and a lower fine. An appeal was lodged on 20 October 1997 before the Colombian Supreme Court of Justice, which upheld the conviction on 18 January 2001.

2.3 Both the Bogotá Regional Court and the National Court were established by Emergency Government Decree No. 2790 of 20 November 1990 (Defence of Justice Statute), and were incorporated in the new Code of Criminal Procedure enacted by Decree No. 2700 of 30 November 1991, which entered into force on 1 July 1992, and which was repealed by Law No. 600 of 2000 which is currently in force. Article 457 on the confidentiality of proceedings held in closed court was repealed by Law No. 504 of 1999. Article 9 of Decree No. 2790 established the public order judges and granted them competence to hear offences provided for in the "Drugs Statute".[1] This article was given permanent legal character by means of Decree No. 2271 of 1991. The above-mentioned Decree No. 2790 withdrew competence to try offences provided for in the "Drugs Statute" from "district criminal courts and district courts exercising mixed jurisdiction" as specialized jurisdictions and established the "public order, faceless or emergency jurisdiction", which was converted into secret "regional justice" after its entry into force on 1 July 1992.

The complaint

3.1 The author claims to be a victim of a violation of the Covenant because Decrees No. 2790 of 20 November 1990 and No. 2700 of 30 November 1991 were applied ex post facto against him. In particular, he claims a violation of article 14, paragraph 1, of the Covenant because neither the Bogotá Prosecution Commission, which conducted the investigation and brought the charges against the author, nor the Bogotá Regional Court, which handed down the judgement against the author, nor the National Court existed at the time the offences were committed, i.e. on 13 May 1990. The author maintains that the Prosecution Commission began the investigation in 1993 and brought charges against him before the Bogotá Regional Court for an offence allegedly committed on 13 May 1990. He states that the court is therefore an unlawful ad hoc body or special commission.

3.2 The author maintains that the court competent to try this case would have been the Cali Circuit Court of Criminal and Mixed Jurisdiction as a specialized court, since it was courts in that category that were competent in drug-trafficking matters at the time the offence was committed. However, since this court was abolished on 15 July 1991, the competent court would have been the Cali Circuit Criminal Court, which is a court of ordinary jurisdiction.

The competent court at second instance, at the appeal stage, would have been the Cali Higher Judicial District Court. The author states that the guarantee of a competent, independent and impartial judge or court has been ignored as he was tried by members of an institution established subsequent to the commission of the offence. He likewise claims that the right to be tried in conformity with laws that predated the act of which he was accused and the guarantee enshrined in article 14 of the Covenant that all persons shall be equal before the courts has been breached, as he has been tried under the restrictive emergency provisions introduced subsequent to the offence.

3.3 The author further states that he was deprived of the right to a public trial, with a public hearing and obligatory attendance by defence counsel and a representative of the public prosecutor's office, as provided for in the Code of Criminal Procedure which entered into force on 1 July 1992. He recalls the decision of the Human Rights Committee in the Elsa Cubas v. Uruguay and Alberta Altesor v. Uruguay cases,[2] where it found that in both cases there had been a violation of article 14, paragraph 1, of the Covenant because the trial had been conducted in camera, in the absence of the defendant, and the judgement had not been rendered in public.

3.4 According to the author, the Regional Court judgement of 21 February 1997 shows that he was convicted on the basis of in camera proceedings conducted in his absence, exclusively in writing and without a public hearing which would have enabled him to confront prosecution witnesses and challenge evidence against him. He never attended the Regional Court or had any personal contact with the judges who convicted him, nor did he meet the faceless National Court judges who rendered judgement at second instance. He maintains that he was denied the guarantee of an independent and impartial trial because he was presumed to be the head of the "Cali cartel", an alleged criminal organization.

Information and observations from the State party with regard to admissibility and the merits

4.1 In its observations of 8 April 1999, 2 May 2000, 28 June 2001 and 26 February 2002, the State party refers to the admissibility requirements for the communication and argues that Miguel Ángel Rodriguez Orejuela has not exhausted domestic remedies, since the remedy of judicial review is still pending,[3] and there are other remedies available, such as the application for review of the facts before the Supreme Court of Justice, which is an autonomous remedy that is exercised outside the criminal process or, in extreme cases, the application for protection (amparo), which has been granted by the Constitutional Court exceptionally in the face of irremediable injury when there is no other means of judicial defence.

4.2 As regards the question of the exhaustion of domestic remedies, the State party considers that the procedural time limits set in Colombian legislation for a criminal proceeding are not, prima facie, unreasonable or arbitrary and do not nullify the right to be heard within a reasonable period.

4.3 As to the merits, the State party argues that Law No. 2 was enacted in 1984 in view of the urgent need to incorporate into the justice system appropriate provisions for addressing new forms of crime, including offences related to drug trafficking. The Law conferred on the specialized judges jurisdiction over cases of this kind. Subsequently, Decree No. 2790 of 1990, issued under the Constitution of 1886, assigned jurisdiction to the courts of public order. However, pursuant to the constitutional reform and to the new Constitution of 1991, a special commission was established to review existing legislation. On finding that the legislation was in conformity with the new constitutional order, the commission decided to incorporate it permanently into the criminal legislation through Decree No. 2266 of 1991. This Decree assigned to the regional courts, known as "faceless" courts, jurisdiction for drug-trafficking offences, which included the offence committed by the author.

4.4 The State party notes that article 250 of the Constitution established the Office of the Public Prosecutor and invested it with power to investigate punishable acts committed in Colombia. The purpose of these provisions, insofar as criminal activities such as drug trafficking were concerned, was to ensure the proper administration of justice, which at that time was seriously threatened by practices such as corruption and intimidation of officials. The State party likewise maintains that these provisions have been adapted to the Colombian constitutional order from the legislation of other countries, which have used it in extreme situations such as those they have experienced in recent times. This does not imply a limitation of the principles and procedural rights mentioned below.

4.5 The State party argues that, consequently, claims concerning a violation of principles such as due process or legality are not valid, since throughout the proceedings against the author judicial officials have observed all applicable substantive and procedural norms, in particular those relating to defence rights and the adversarial and public nature of the proceedings. The author was at all times represented by his counsel, was shown all the evidence, and was given the opportunity to challenge the evidence and the judgements rendered.

4.6 Concerning the author's argument that the most favourable criminal law in Colombia's procedural law was not applied, the State party considers that this argument falls outside the scope of the Covenant and is therefore inadmissible.

The author's comments relating to admissibility and the merits

5.1 In his comments of 13 December 1999, 21 August 2001, and 23 April 2002, the author responds to the State party on the question of admissibility and the merits, and states that with the decision on the application for judicial review of 18 January 2001, the problem of the exhaustion of domestic remedies has been resolved, but presses the point that the Supreme Court took 39 months to reach a decision on the application and that there had thus been unwarranted delay in the remedies available domestically. On the application for review, the author maintains that this is not admissible since it is an autonomous action and not a remedy that is in conformity with article 5, paragraph 2 (b) of the Optional Protocol. He argues that in criminal law, "Action is not the same as remedy: the actio is an abstract right to take procedural action of a public nature in order to trigger jurisdictional activity, while the remedy is the means of challenging a decision in an ongoing trial. In this case, the ordinary remedies and the special remedy of appeal, provided for during the trial and the criminal proceedings under Colombian criminal law, have been exhausted, so that no other remedy remains to be exhausted."

5.2 The author likewise maintains that the application for protection or amparo laid down in article 86 of the Constitution was also inadmissible since the Constitutional Court had declared unconstitutional, in a decision of 1 October 1992, the articles that allowed this action against judgements and other judicial decisions in criminal matters. Moreover, the application for protection would only be admissible if the person concerned had no other means of judicial defence, such as the remedy of judicial review.

5.3 The author refers to the decision of 26 April 2001 of the Supreme Council of the Judiciary, which found that the application for protection "is inadmissible when the applicant has other means of judicial defence. The application for protection is not, therefore, an alternative, additional or complementary means to achieve the proposed end. Neither can it be claimed that it is the last resort available to the actor, because by its very nature, according to the Constitution, it is the only means of protection specifically incorporated into the Constitution to fill the lacunae that could arise in the legal system so as to provide full protection of individuals' rights. Consequently, it is understood that when an ordinary judicial remedy has been applicable, no claim can be made to supplement the proceedings with an application for protection, given that under article 86 of the Constitution, such a mechanism is inadmissible as long as there is another legal option for protection".

5.4 As regards the merits, the author argues that the State party's explanations concerning "faceless" justice, established "to ensure the proper administration of justice despite the devastating effects of organized crime", and also the conversion of the transitional emergency criminal legislation into permanent legislation, simply confirm the fact that the Colombian State has violated article 14, paragraph 1, of the Covenant relating to trial by a competent, independent and impartial tribunal, due criminal guarantees and the guarantee of equality for all persons before the courts.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 As regards the requirement of the exhaustion of domestic remedies, the Committee notes that the State party is contesting the communication on the ground of failure to exhaust those remedies, further stating that, in addition to the remedy of judicial review (casación), there are other available remedies such as the application for review (revisión) and protection. The Committee further notes the State party's explanations that the application for protection is a subsidiary procedure that has been allowed only in exceptional circumstances and that its protection is only temporary until the judge hands down his decision. In this connection, bearing in mind that in the present case there has been a decision of the Supreme Court of Justice against which there is no remedy, the Committee considers that the State party has not demonstrated that other effective domestic remedies exist in the case of Mr. Rodríguez Orejuela.

6.4 Consequently, the Committee has determined, in accordance with article 5, paragraph 2 (b), of the Optional Protocol, that there is nothing to prevent the communication being declared admissible, and proceeds to examine the merits of the case.

Examination of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 The author claims a violation of article 14, paragraph 1, of the Covenant because he was deprived of his right to be tried by the court that would have been competent at the time that the alleged offence was committed, and was charged in, and tried at first and second instance by, courts whose jurisdiction was established subsequent to the events in question. In this respect, the Committee notes the State party's explanations to the effect that the law in question was established in order to ensure the proper administration of justice, which was under threat at the time. The Committee considers that the author has not demonstrated how the entry into force of new procedural rules and the fact that these are applicable from the time of their entry into force constitute in themselves a violation of the principle of a competent court and the principle of the equality of all persons before the courts, as established in article 14, paragraph 1.

7.3 The author maintains that the proceedings against him were conducted only in writing, excluding any hearing, either oral or public. The Committee notes that the State party has not refuted these allegations but has merely indicated that the decisions were made public. The Committee observes that in order to guarantee the rights of the defence enshrined in article 14, paragraph 3, of the Covenant, in particular those contained in subparagraphs (d) and (e), all criminal proceedings must provide the person charged with the criminal offence the right to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine the witnesses. Taking into account the fact that the author did not have such a hearing during the proceedings that culminated in his conviction and sentencing, the Committee finds that there was a violation of the right of the author to a fair trial in accordance with article 14 of the Covenant.

7.4 In view of its conclusion that the right of the author to a fair trial in accordance with article 14 of the Covenant was violated for the reasons set out in paragraph 7.3, the Committee is of the opinion that it is not necessary to consider other arguments relating to violations of his right to a fair trial.

8. The Human Rights Committee, acting under article 5, paragraph 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr Miguel Ángel Rodríguez Orejuela with an effective remedy.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective remedy if it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party should also publish these Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] This article stipulates that the competence of the public order courts responsible for hearing cases shall include ongoing actions and proceedings for punishable acts assigned to them under the article, regardless of the time when they were perpetrated, and related offences. It further stipulates that in every case favourable substantive law or procedural law having subsiantive effects of the same character shall have primacy over unfavourable law.

[2] Ref. Elsa Cubas v. Uruguay, View No. 70/1980 of 1 April 1982, and Alberto Altesor v. Uruguay, View No. 10/1997 of 23 March 1982.

[3] When the State party sent its observations of 8 April 1999 and 2 May 2000, no decision had yet been handed down on the remedy of judicial review.

V. Communication No. 854/1999, Wackenheim v. France (Views adopted on 15 July 2002, seventy-fifth session)*

Submitted by:	Manuel Wackenheim (represented by counsel, Mr. Serge Pautot)
Alleged victim:	The author
State party:	France
Date of communication:	13 November 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 2002,

Having concluded its consideration of Communication No. 854/1999 submitted by Mr. Manuel Wackenheim under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Manuel Wackenheim, a French citizen born on 12 February 1967 in Sarreguemines, France. He claims to be a victim of violations by France of article 2, paragraph 1; article 5, paragraph 2; article 9, paragraph 1; article 16; article 17, paragraph 1; and article 26, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author, who suffers from dwarfism, began in July 1991 to appear in "dwarf tossing" events organized by a company called Société Fun-Productions. Wearing suitable protective gear, he would allow himself to be thrown short distances onto an airbed by clients of the establishment staging the event (a discotheque).

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.2 On 27 November 1991, the French Ministry of the Interior issued a circular on the policing of public events, in particular dwarf tossing, which instructed prefects to use their policing powers to instruct mayors to keep a close eye on spectacles staged in their communes. The circular said that dwarf tossing should be banned on the basis of, among other things, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.3 On 30 October 1991 the author applied to the administrative court in Versailles to annul an order dated 25 October 1991 by the mayor of Morsang-sur-Orge banning a dwarf tossing event scheduled to take place in a local discotheque. The court annulled the mayor's order in a ruling on 25 February 1992, on the grounds that:

> The evidence on file does not show that the banned event was of a nature to disturb the public order, peace or health in the town of Morsang-sur-Orge; the mere fact that certain notable individuals may have voiced public disapproval of such an event being held could not be taken to suggest that a disturbance of public order might ensue; even supposing, as the mayor maintains, that the event might have represented a degrading affront to human dignity, a ban could not be legally ordered in the absence of particular local circumstances; the order under challenge is thus vitiated by an overstepping of authority [...]

2.4 On 24 April 1992, the commune of Morsang-sur-Orge, represented by its then mayor, appealed against the ruling of 25 February 1992.

2.5 By an order dated 27 October 1995 the Council of State overturned the ruling on the grounds, first, that dwarf tossing was an attraction that affronted human dignity, respect for human dignity being part of public order and the authority vested in the municipal police being the means of ensuring it, and second, that respect for the principle of freedom of employment and trade was no impediment to the banning of an activity, licit or otherwise, in exercise of that authority if the activity was of a nature to disrupt public order. The Council of State went on to say that the attraction could be banned even in the absence of particular local circumstances.

2.6 On 20 March 1992 the author made another application for annulment of an order by the mayor of Aix-en-Provence banning a dwarf tossing event planned to take place in his commune. In a ruling on 8 October 1992 the administrative court of Marseille annulled the mayor's decision on the grounds that the activity in question was not of a nature to affront human dignity. Aix-en-Provence, represented by its mayor, appealed against this ruling in an application dated 16 December 1992. By order dated 27 October 1995 the Council of State overturned the ruling on the same grounds as given above. Since that order, Société Fun-Productions has decided no longer to engage in activities of this kind. In spite of his desire to continue, the author has since been without a job for want of anyone to organize dwarf tossing events.

The complaint

3. The author affirms that banning him from working has had an adverse effect on his life and represents an affront to his dignity. He claims to be the victim of a violation by France of his right to freedom, employment, respect for private life and an adequate standard of living, and

of an act of discrimination. He further states that there is no work for dwarves in France and that his job does not constitute an affront to human dignity since dignity consists in having a job. He invokes article 2, paragraph 1; article 5, paragraph 2;[1] article 9, paragraph 1; article 16;[2] article 17, paragraph 1; and article 26, of the International Covenant on Civil and Political Rights.

Observations by the State party

4.1 In observations dated 13 July 1999, the State party argues, first, that the alleged violations of article 9, paragraph 1, and article 16 should be set aside at once inasmuch as they are unrelated to the facts at issue. The complaint of a violation of article 9, paragraph 1, it continues, is in substance identical to a claimed violation of article 5 of the European Convention which the author has already brought before the European Commission,[3] and should be rejected for the same reasons as the Commission puts forward. In the view of the State party the author has not been subjected to any deprivation of liberty. As regards the claimed violation of article 16 of the Covenant, the State party points out that the author does not put forward any arguments to show that banning dwarf tossing events has in any way affected his legal personality. It affirms, moreover, that the bans do not affect his legal personality at all, and thus leave his position as the beneficiary of rights unassailed. On the other hand the bans do, the State party considers, acknowledge the author's right to respect for his dignity as a human being, and ensure that that right is indeed respected.

4.2 As regards the alleged violation of article 17, paragraph 1, of the Covenant, the State party says that the author has not exhausted the available domestic remedies. The author's communication being based on the same facts and proceedings as were brought to the attention of the European Commission, his failure to bring before the French courts a complaint of a violation of the right to respect for his private and family life effectively renders the communication inadmissible in the present case, too. On a related point to do with the author's right to respect for his private life, the State party explains that the contested ban entailed no violation of article 17, paragraph 1, of the Covenant. To begin with, the right invoked by the author to allow himself to be "tossed" in public for a living does not appear to belong within the orbit of private and family life. Nor is it clear whether it extends beyond the realm of private life. The State party argues that dwarf tossing is a public practice and, as far as the author is concerned, a genuine professional activity. In that case it can hardly be protected, the State party concludes, on the strength of arguments deriving from the respect due to private life. It is more a matter, as the reasoning followed by the Council of State makes clear, of freedom of employment or freedom of trade and industry. Next, the State party goes on, even assuming that under a particularly wide-ranging interpretation of the notion the possibility of being "tossed" for a living does stem from the author's right to respect for his private life, the limit that has been imposed on that right is not contrary to article 17, paragraph 1, of the Covenant. That limit, the State party considers, is justified by higher considerations deriving from the respect due to the dignity of the human person. Hence it is rooted in a fundamental principle and thus constitutes neither an illegal nor an arbitrary encroachment upon individuals' right to respect for their private and family lives.

4.3 Regarding the alleged violation of article 2, paragraph 1, of the Covenant, the State party believes that the article is similar in content to article 14 of the European Convention; the European Commission found that that article, which the author cited in his application to the Commission, was not in fact applicable since the author did not elsewhere invoke any right which the Convention protected. The State party asserts that the same is true of the present communication, since the author again fails to show that his claimed right to be tossed professionally is recognized in the Covenant or could be derived from one of the rights the Covenant does cover. It adds that, if the author's intention is to avail himself of such rights, it must be remembered that freedom of employment and freedom of trade and industry are not among the rights protected by the International Covenant on Civil and Political Rights.

4.4 On the alleged violation of article 26 of the Covenant, the State party stresses that the Council of State regards the non-discrimination clause in that article as the counterpart to article 2, paragraph 1, and as with article 2, the scope of application of article 26 is limited to the rights protected by the Covenant.[4] From that interpretation it follows, the State party argues, that as already stated in reference to the alleged violation of article 2, paragraph 1, a dwarf's right to be tossed for a living derives from none of the rights protected by the Covenant and the question of non-discrimination therefore does not arise. If for the sake of argument, the State party goes on, the non-discrimination language in article 26 were to be held valid for all rights enshrined both in the Covenant and in the domestic legal order, the question would arise of whether the contested ban is discriminatory. Self-evidently, the State party argues, it is not. By definition it applies only to individuals suffering from dwarfism since they are the only ones who might be involved in the banned activity; the indignity of the activity stems very specifically from those individuals' particular physical characteristics. The State party says it cannot be upbraided for treating dwarves differently from those who are not since they are two separate categories of individuals and for one of them "tossing", for obvious physical reasons, cannot be of any concern. It also says that any discussion of whether an activity involving the tossing of people of normal size, i.e. unaffected by a specific handicap, was undignified would take a very different form.[5] It concludes that the difference in treatment is based on an objective difference in status between those suffering from dwarfism and those that are not and hence, given the underlying aim of upholding human dignity, is legitimate and, in any event, consistent with article 26 of the Covenant.

4.5 Concerning the alleged violation of article 5, paragraph 2, of the Covenant, the State party declares that the author presents no arguments showing why banning dwarf tossing should be contrary to that provision. It is difficult to see, in the State party's view, in what way the State authorities might have unduly restricted rights recognized under French law on the basis of the Covenant. The author may perhaps consider that the authorities have evinced an over-extended notion of human dignity which has prevented him from asserting his rights to employment and to pursue the occupation of his choosing, but the State party argues that an individual's right to respect as a human being is not one of those covered by the Covenant even if some of the wording in the Covenant - such as the ban on inhuman and degrading treatment - is in fact inspired by that notion. For that reason it concludes that article 5, paragraph 2, is not applicable in the present case. It adds that, even supposing for the sake of argument that the article were held to apply, it would not have been infringed: the action taken by the authorities was not prompted by a desire to restrict freedom of employment, trade and industry unduly on the grounds of due respect for the individual; it is a classic instance in administrative police practice of reconciling the exercise of economic freedoms with the desire to uphold public order, one element of which is public morals. Such a construction is not excessive since on the one hand, as Government Commissioner[6] Frydman said in his findings, public order has long incorporated notions of public morals and, on the other hand, it would be shocking were the basic principle of due respect for the individual to be abandoned for the sake of material considerations specific to the author (and otherwise scarcely commonplace), to the detriment of the overall community to which the author belongs.

4.6 For the above reasons, the State party concludes that the communication should be rejected as there is no basis for any of the complaints it contains.

Counsel's comments on the State party's observations

5.1 In comments dated 19 June 2000, counsel for the author argues that the State party is taking refuge in the first instance behind two identical orders handed down on 27 October 1995 by the Council of State, granting mayors the right to ban dwarf tossing events in their communes on the grounds that "human dignity is a part of public order" even in the absence of particular local circumstances and despite the consent of the individual concerned. Counsel rehearses the facts on which the communication is based, including the annulment by the administrative courts of the mayors' orders banning dwarf tossing events and the circular from the Ministry of the Interior.

5.2 Counsel says that the important decisions on points of principle taken in Mr. Wackenheim's case are disappointing. To the tripartite structure of public order in France as normally portrayed - order (tranquillity), safety (security) and public health - a fourth component - public morals, embracing respect for human dignity - has been added. Case law of this kind at the dawn of the twenty-first century revives the notion of moral order, counsel argues, directed against an activity that is both marginal and inoffensive when compared with the many forms of truly violent, aggressive behaviour that are tolerated in modern French society. The effect, counsel goes on, is to enshrine a new policing authority that threatens to open the door to all kinds of abuse: are mayors to become censors of public morality and defenders of human dignity? Are the courts to rule on citizens' happiness? Hitherto, counsel says, the courts have been able to take the protection of public morals into account insofar as it has repercussions on public tranquillity. In the case of dwarf tossing events, however, counsel affirms that that requirement has not been met.

5.3 Counsel stands by the substance of the complaint and emphasizes that employment is an element of human dignity: depriving an individual of his employment is tantamount to diminishing his dignity.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 Although France has entered a reservation to article 5, paragraph 2 (a), the Committee notes that it has not invoked that reservation which does not, therefore, impede consideration of the communication by the Committee.

6.3 In the case of the claimed violations of article 9, paragraph 1, and article 16 of the Covenant, the Committee takes note of the State party's arguments about the inconsistency of the complaints with the Covenant ratione materiae. It finds that the information furnished by the author does not provide grounds for claiming that these articles have been violated or for holding the complaints to be admissible under article 2 of the Optional Protocol.

6.4 Regarding the author's claims of a violation of article 17, paragraph 1, of the Covenant, the Committee points out that the author has at no point complained to the French courts of a violation of the right to respect for private and family life. In this respect, therefore, the author has not exhausted all the remedies that were at his disposal. The Committee thus declares this element of the communication to be inadmissible in the light of article 5, paragraph 2 (b), of the Optional Protocol.

6.5 As regards the alleged violation of article 5, paragraph 2, of the Covenant, the Committee notes that article 5 of the Covenant relates to general undertakings by State parties and cannot be invoked by individuals as a self-standing ground for a communication under the Optional Protocol. This complaint is thus not admissible under article 3 of the Optional Protocol. However, this conclusion does not prevent the Committee from taking article 5 into account when interpreting and applying other provisions of the Covenant.

6.6 As regards the author's complaint of discrimination under article 26 of the Covenant, the Committee takes note of the State party's observation that the Council of State holds the scope of application of article 26 to be limited to the rights protected by the Covenant. The Committee nevertheless wishes to draw attention to its jurisprudence establishing that article 26 does not simply duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. The application of the principle of non-discrimination contained in article 26 is therefore not limited to those rights which are provided for in the Covenant. As the State party has not put forward any other arguments against finding the communication admissible, the Committee finds the communication admissible inasmuch as it appears to raise questions pertaining to article 26 of the Covenant, and thus proceeds to examine the complaint on its merits, in accordance with article 5, paragraph 2 of the Optional Protocol.

The Committee's deliberations on the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee must decide whether the authorities' ban on dwarf tossing constitutes discrimination within the meaning of article 26 of the Covenant, as the author asserts.

7.3 The Committee recalls its jurisprudence whereby not every differentiation of treatment of persons will necessarily constitute discrimination, which is prohibited under article 26 of the Covenant. Differentiation constitutes discrimination when it is not based on objective and reasonable grounds. The question, in the present case, is whether the differentiation between the persons covered by the ban ordered by the State party and persons to whom this ban does not apply may be validly justified.

7.4 The ban on throwing ordered by the State party in the present case applies only to dwarves (as described in paragraph 2.1). However, if these persons are covered to the exclusion of others, the reason is that they are the only persons capable of being thrown. Thus, the differentiation between the persons covered by the ban, namely dwarves, and those to whom it does not apply, namely persons not suffering from dwarfism, is based on an objective reason and is not discriminatory in its purpose. The Committee considers that the State party has demonstrated, in the present case, that the ban on dwarf tossing as practised by the author did not constitute an abusive measure but was necessary in order to protect public order which brings into play considerations of human dignity that are compatible with the objectives of the Covenant. The Committee accordingly concludes that the differentiation between the author and the persons to whom the ban ordered by the State party does not apply was based on objective and reasonable grounds.

7.5 The Committee is aware of the fact that there are other activities which are not banned but which might possibly be banned on the basis of grounds similar to those which justify the ban on dwarf tossing. However, the Committee is of the opinion that, given that the ban on dwarf tossing is based on objective and reasonable criteria and the author has not established that this measure was discriminatory in purpose, the mere fact that there may be other activities liable to be banned is not in itself sufficient to confer a discriminatory character on the ban on dwarf tossing. For these reasons, the Committee considers that, in ordering the above-mentioned ban, the State party has not, in the present case, violated the rights of the author as contained in article 26 of the Covenant.

7.6 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal any violation of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The author does not elaborate on the alleged violation of this article.

[2] The author does not elaborate on the alleged violation of this article.

[3] The material on file shows that on 4 February 1994 the European Commission on Human Rights took up a complaint by Mr. Wackenheim against France. On 16 October 1996 it declared

that complaint inadmissible on the grounds that, first, the author had not exhausted the domestic remedies available against the alleged violations of articles 8 and 14 (alleged discrimination in the exercise of the right to employment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, second, the author's complaints regarding article 5, paragraph 1, and article 14 of the Convention were inconsistent ratione materiae.

[4] Council of State, Vve Doukoure, section opinion handed down on 15 April 1996, No. 176399.

[5] Findings of Government Commissioner Patrick Frydman, RTDH 1996, p. 664.

[6] The Government Commissioner is not a representative of the administration. He is a member of the Council of State whose presence is required when the Council sits as a judicial body and whose role is to offer a completely independent opinion "on the factual circumstances and the applicable rules of law, and his view of the solutions which, his conscience tells him, the dispute under consideration calls for". This definition, given in one of its judgements by the Council of State itself (CE Sect. 10 July 1957, Gervaise, Leb. p .467), has been incorporated into article L7 of the Code of Administrative Justice (Source: "Justice et institutions judiciaires", La Documentation Française, 2001).

W. Communication No. 859/1999, Jiménez Vaca v. Colombia (Views adopted on 25 March 2002, seventy-fourth session)*

Submitted by:	Mr. Luis Asdrúbal Jiménez Vaca
Alleged victim:	The author
State party:	Colombia
Date of communication:	4 December 1998 (initial communication)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2002,

Having concluded its consideration of Communication No. 859/1999 submitted to the Human Rights Committee by Mr. Luis Asdrúbal Jiménez Vaca under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Luis Asdrúbal Jiménez Vaca, a Colombian citizen living in exile since 1988 and currently resident in the United Kingdom, where he was granted refugee status in 1989. He claims that he is the victim of the violation by Colombia of article 2, paragraph 3; article 6, paragraph 1; article 9, paragraph 1; article 12, paragraphs 1 and 4; article 17, paragraph 1; article 19; article 22, paragraph 1; and article 25 of the International Covenant on Civil and Political Rights.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 Mr. Jiménez Vaca was a practising trial lawyer in the city of Medellin and in the region of Urabá, based for his work in the municipality of Turbo. He was the legal adviser in the region to several trade unions and people's and peasants' organizations, including the Sindicato de Trabajadores Agropecuarios de Antioquía ("Sintagro" - Antioquía agricultural and livestock workers union) and the Sindicato de Embarcadores y Braceros de Turbo ("Sindebras" - Turbo loaders and seasonal workers union).

2.2 From 1980 onwards, the author was a member of the various commissions set up by the Government to find a solution to the social and labour conflicts and the violence in the region, including the Tripartite Commission, the Special Commission for Urabá, the Commission on Permanent Guarantees in Urabá and the High-Level Commission. The author was also a member of the national and regional executive of the Frente Popular opposition political party until his exile in 1988.

2.3 In 1980, because of his professional activities on behalf of the unions, the author began to be summoned, harassed and temporarily detained by the Voltigeros military battalion. The arbitrary detention of workers became common practice, as did the presence of soldiers at union meetings, and prior authorization from the military commander was required for union activities.

2.4 On 15 December 1981, at a Sintagro meeting in Turbo municipality, a military patrol detained the participants, including the author, questioned them and photographed them. Some of them were taken to the Voltigeros battalion quarters, where they were tortured in various ways. The author was released after three hours of detention on condition that he should report to the chief of military intelligence in five days' time. When he did so, the author was interrogated and urged to "collaborate" with the military authorities in order to "avoid problems in the future".

2.5 Between 1984 and 1985, the author advised Sintagro in the negotiation of over 150 collective agreements it signed with the banana companies. During the negotiations, soldiers, police officers and secret agents kept the author and his residence and office under constant surveillance. The author received death threats and was harassed with phone calls and written messages telling him to leave the area and asking where he would like to die, with a warning that the authorities knew where his family lived.

2.6. As a result, the author submitted a criminal complaint regarding the death threats to the second circuit court in Turbo. The court notified the Antioquia Administrative Court on 22 October 1990 that the proceedings for extortion practised on the Sindebras board of directors, in which the author was registered as an aggrieved party, had been transmitted. The author claims that he never learned of the outcome of these proceedings. The author also claims to have no knowledge of the outcome of the investigations regarding the criminal complaint he had filed with the regional procurator's office in Turbo in mid-1984.

2.7 In September 1984, the author lodged a complaint for death threats with the regional office of the administrative security department in Turbo, but was never informed of the outcome of the investigation.

2.8 On 26 August 1985, pamphlets were delivered under the doors of a number of houses, asking "Are you a member of Sintagro? Doesn't it bother you to belong to a group of hired assassins and murderers of the people, drug bandits led by Argemiro Correa, Asdrúbal Jiménez and Fabio Villa?" A few days later, another pamphlet was circulated, in which the author was warned to avoid certain areas if he did not want to follow his colleagues to the cemetery. Some time afterwards one of the author's brothers disappeared and another was murdered.

2.9 In December 1985, the author, together with other Sintagro leaders, reported the Voltígeros battalion's intervention in labour conflicts to the Procurator-General and called for an investigation of the soldiers involved in the harassment and threats. The author was never informed of the outcome.

2.10 In October 1986, the author lodged a complaint with the Foro por el Derecho a la Vida (Forum for the Right to Life), with the assistance of several authorities, including the Procurator-General and the National Director of Pre-Trial Proceedings.

2.11 At the beginning of 1987, as a result of the wave of violence against workers and the population, the Government set up a high-level commission, of which the author was a member alongside civil, military and security authorities. When the Commission met in February 1987, the author lodged complaints for the death threats and harassment to which he was being subjected. After he had worked with the Commission, the author was forced to leave Urabá and take refuge in Medellín for safety.

2.12 On 6 September 1987, the author again asked the authorities for protection as he was receiving death threats more frequently since becoming involved in the High-Level Commission. He then received a number of visits from unknown men, and this led him to close the Medellín office for good in November 1987 and move to Bogotá. He was subsequently urged to leave the country.

2.13 On 4 April 1988, as the author was travelling with Sonia Roldán in a taxi from the airport to Medellín, two men dressed in civilian clothes and riding a bicycle fired pistol shots at the taxi, hitting the author twice. The men fled after the attack thinking that the author was dead. After five days in hospital, the author was transferred for security reasons to another hospital. He stayed there until he was well enough to travel to the United Kingdom, where he requested asylum on 20 May 1988. He was granted refugee status on 4 January 1989. This assault left the author with, inter alia, permanent damage to his motor and gastrointestinal systems and impaired circulation in one leg.

2.14 On 9 February 1990, the author submitted, by proxy, a claim for damages to the administrative court on the grounds that the authorities had failed to protect his life and to ensure his right to practise as a lawyer, but this claim was dismissed on 8 July 1999.[1] Criminal Court No. 28 in Medellín officially undertook the criminal investigation into the attempt on the author's life, but the author knows nothing of the outcome.

2.15 While in exile, the author corresponded regularly with his daughter and other persons. This correspondence was constantly intercepted and checked.

The complaint

3.1 The author maintains that the State party was under a legal obligation to investigate the attempt on his life as a matter of course. Under article 33 of the Colombian Code of Criminal Procedure (Decree No. 050 of 1987) in force at the time, the approximate total duration of the preliminary investigation, the pre-trial proceedings and the trial should be 240 days. The author points out that over 10 years after the assault the outcome of the investigations is still not known.

3.2 The author claims to be the victim of a violation of article 2, paragraph 3, of the Covenant, as the State party does not provide the victims of human rights violations with sufficient guarantees for remedies to be considered effective. He maintains that the investigations that the State party ought to have undertaken as a matter of course into the attempt on his life never produced any results. He explains that in his case, owing to his urgent departure from the country and the risk that hiring a lawyer to defend him would have entailed, he has been prevented from personally taking an active part in the investigation. He also claims to have granted power of attorney to a lawyer to file a claim for damages with the Antioquia Administrative Court. This claim was never resolved. The author therefore considers that not only were the domestic remedies excessively delayed but also that no effective remedy existed, as the various official departments have denied that the records, communications, complaints and requests ever existed.

3.3 With regard to the violation of article 6, paragraph 1, the author maintains that the attack on him, which left him fighting for his life and was facilitated by the conduct of the Colombian authorities in that they took no action to prevent it, is in itself a violation of the right to life and that no one can be deprived of life arbitrarily.

3.4 The author asserts that article 9, paragraph 1, of the Covenant has been violated because the State party was under an obligation to take the necessary steps to ensure his personal safety and never did so, despite being aware of the numerous instances of harassment and provocation and the death threats the author was receiving, some from the military and police authorities themselves. In this respect, the author maintains that the State party has failed to comply with article 9, paragraph 1, as in the case of William Eduardo Delgado Páez v. Colombia (Communication No. 195/1985, Views adopted on 12 July 1990).

3.5 Likewise, the author considers that his right to freedom of movement within Colombian territory and to choose his residence has been breached, in violation of article 12, paragraph 1, of the Covenant, in that he was prevented from residing and practising as a lawyer in the place of his choosing, so that his right to reside and practise his profession in his country was not ensured and he was forced into exile. As to article 12, paragraph 4, the author maintains that although there is no express ban by the Colombian authorities on his entering the country, he is denied this right as he constitutes a military objective.

3.6 Furthermore, the author claims that the correspondence between himself and his daughter and between himself and others has been checked by the Colombian national police on various occasions, in violation of article 17, paragraph 1, of the Covenant.

3.7 The author maintains that the people who made the attempt on his life did so to punish him for his political and social views, in violation of the provisions of article 19 of the Covenant.

3.8 Lastly, it is alleged that article 22, paragraph 1, and article 25 were violated on account of the author's commitment to defending the right to freedom of association and workers' rights and because he was an activist in the Frente Popular political party, for which he carried out various activities of a social and democratic nature.

Information and observations from the State party and comments by the author on admissibility

4.1 In its observations of 21 September 1999, the State party refers to articles 1 and 2 of the Optional Protocol relating to the requirements for the admissibility of a communication and maintains that Mr. Luis Asdrúbal Jiménez Vaca has not exhausted domestic remedies, since he filed a claim for damages with the Antioquia Administrative Court. The court passed judgement at first instance on 8 July 1999 dismissing his claims, and a decision on the appeal lodged in August 1999 is currently pending.

4.2 With regard to article 17, paragraph 1, the State party guarantees the constitutional right to the inviolability of a person's correspondence, pointing out that any illegal act must be reported so that it can be investigated. To this end, the national police have been urged to conduct an investigation with a view to determining the facts.

4.3 In his comments of 16 November 1999, the author replies that the claims by the State party that domestic remedies have not been exhausted, in which reference is made to the appeal pending before the Council of State as court of appeal, are unfounded and points out that, according to the jurisprudence of the Human Rights Committee, domestic judicial remedies must not only be available but also effective.[2] The author also maintains that, according to the State party, the administrative courts are not part of the judicial branch. He argues that the administrative court issued a decision nine years and five months after the event because his communication to the Committee had put the court under pressure, and that domestic remedies can be considered to have been exhausted if the proceedings are excessively prolonged.

4.4 In its additional observations of 26 October 1999, the State party explains to the Human Rights Committee that, according to information from the Office of the Ombudsman and after reviewing the archives of the National Office for Examination and Processing of Complaints, no complaint was found relating to the events described by the author. Moreover, the Office of the Procurator-General is on record as stating that neither the Armed Forces Division, the Human Rights Division, the Antioquia Departmental Division nor the National Special Investigations Department carried out any disciplinary investigation into members of the national army for the alleged harassment, provocation or attempted murder of, or threats against, the author.

4.5 In addition, the State party explains that Major Oscar Vírguez Vírguez in the Military Examining Court filed a suit against the author for the offence of calumny and misrepresentation. The grounds for the complaint were the accusations made to the media by the author and by

Aníbal Palacio Tamayo concerning alleged threats against the author and Argemiro Miranda. The Armed Forces Division responded to the accusations by investigating Major Vírguez's conduct, and found the accusations baseless.

4.6 In his additional comments of 5 August 2000, the author claims that the Office of the Ombudsman was created after the events at the heart of the complaint, with the adoption of the 1991 Constitution when he was already in exile. He maintains that his complaints, identifying the fourth and tenth army brigades as possibly being responsible for the harassment and death threats to which he was subjected, were detailed and known to the authorities. Despite being aware of what had happened, the authorities never took any action. On the contrary, the only investigation undertaken was ended, which prevented any light from being shed on the events. Furthermore, neither the content of the complaints nor the seriousness of the risks were assessed, and there was no attempt to identify the instigators or perpetrators.

4.7 The author claims that the only reason Major Vírguez lodged the complaint of calumny and misrepresentation was to obstruct the course of the investigations, which might have compromised military institutions, and to hold up the investigation ordered into them. He was never summoned to appear before any judicial authority to confirm the facts. According to the author, the military criminal courts did not have jurisdiction to investigate him for the offences mentioned as he himself maintained no relationship with the Colombian military forces.

4.8 Lastly, the author again states that domestic judicial remedies must not only be available but also effective.

Information and observations from the State party and comments by the author on the merits

5.1 In its observations of 21 September 1999, the State party explains, with reference to the alleged violation of article 2, paragraph 3, that it can be difficult in certain circumstances to investigate actions that may infringe rights of the person. In addition, the fact that the final outcome of the criminal investigation is not known does not necessarily imply that the State party has done anything wrong, since the complexity of the matter and the activities of the person concerned need to be taken into account. Furthermore, according to the State party, the report submitted by the second criminal circuit court in Turbo points out that the case heard dealt with extortion practised on the Sindebras board of directors, not attempted murder. Moreover, the report concludes that while the extortion was reportedly practised on the Sindebras board of directors, with Mr. Jiménez registered as an aggrieved party, this does not mean that the extortion was directed specifically against him. While the author may be right to claim that the State party has a formal obligation to investigate certain offences, including attempts on a person's life, the criminal complaint referred to by the author is unrelated to the alleged attack on him.

5.2 The State party disputes the author's claim that he did not hire a lawyer after leaving the country because of the risks involved in doing so. The author was still able to lodge a complaint with the administrative court, though not in order to complain about the proceedings relating to the attack on him. The State party also refutes the argument that it has failed in its duty to provide an "effective remedy", since, in the case heard in the Antioquia Administrative Court, papers supplied by the chief of police in Urabá had been produced that showed there had been no request in 1986, 1987 or 1988 to provide the author with personal protection. Statements to that effect were also made by the chief of the Antioquia police force, the head of the intelligence service of the judicial police (SIJIN) in Antioquia, the Director-General of the Police and the Armed Forces Division.

5.3 With regard to the alleged violation of article 6, paragraph 1, the State party points out that, as far as can be inferred from the events described in the claim, the author holds it responsible for failing to protect his life and even refers to its direct participation, through anonymous State agents, in committing the act. For the State to be held responsible for a failure of security, the victim must have requested protection from the authorities in respect of a potential danger and the authorities must have refused or failed to provide protection or provided inadequate protection. According to the State party, generic requests in the form of public complaints are not an effective way to call on the authorities to provide an individual with effective protection. While the State party would not seek to evade its constitutional responsibility for providing protection, it should be pointed out that each individual case must be dealt with on its own merits.

5.4 Lastly, the State party has set up new protection programmes. In the particular case of union leaders, there is now a protection programme for witnesses and threatened persons. Provisions under this programme include an information centre, technical assistance, preventive action, emergency help, the purchase of communication systems, the purchase of vehicles, individual protection and protection for the offices of non-governmental and trade union organizations. Moreover, if the author should decide to return to the country, he would enjoy all the safeguards provided by the authorities and the protection merited in his particular case.

5.5 According to the State party, with regard to article 12, paragraphs 1 and 4, article 19, article 22, paragraph 1, and article 25, the violations of the fundamental rights of various social sectors have a knock-on effect on other fundamental human rights such as freedom of thought, the right to own property, freedom of association, freedom to choose a residence and the right to liberty of movement. However, it cannot be claimed that the State is responsible for matters arising indirectly out of violent acts affecting a number of fundamental rights. Acts of violence are usually directed indiscriminately at members of society regardless of their economic or social position. In many cases, the deciding factor has tended to be linked to circumstances such as a person's place of residence or daily activities. Nevertheless, given that acts of violence are not primarily aimed at violating those or other rights, action to counteract the effects of a violent situation should be directed against the main underlying problem, the internal armed conflict.

5.6 For the reasons given above, the State party disagrees with the argument put forward by the author, since his version of events does not present any specific situations showing that State agents were responsible for the alleged violation of his fundamental rights.

5.7 In his comments of 16 November 1999, the author replies to the State party's claims on the merits, emphasizing that there is indeed enough evidence in the communication to infer that the State party is responsible for the violation of the Covenant.

5.8 The author maintains that he brought the death threats made against him to the attention of the second criminal circuit court in Turbo, as was acknowledged by the State party and recorded in the proceedings of the administrative court. The purpose of this complaint was to expedite legal proceedings so that those making the threats would be investigated and the author provided with the necessary protection. While the death threats (extortion) may not be in the same category as the later attempted murder, there is a relationship of cause and effect in that the authorities, with full knowledge of the facts, did nothing to prevent or stop the attempt. The author also maintains that once the attempt on his life had been reported, the State had a duty under article 33 of the Code of Criminal Procedure to open an inquiry as a matter of course.

5.9 Moreover, the denials by the police chiefs and the Armed Forces Division could be part of the general strategy of favouring impunity and rendering an effective remedy inoperative.

5.10 Lastly, with regard to the protection programme for witnesses and threatened persons referred to by the State party, the author is of the view that to safeguard citizens' lives and security, something more than promises is required.

5.11 In its additional observations of 30 August 2001, the State party explains that, despite frequent threats against him, the author did not follow up the outcome of his complaints; nor did he follow the recommendations of the second criminal circuit court of Turbo, nor did he consider approaching other national bodies.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the requirement that domestic remedies must have been exhausted, the Committee notes that the State party disputes the communication's contention that they have been exhausted. However, the Committee observes that the threats against the author on various occasions prior to the attempt on his life were reported to the second criminal circuit court of Turbo and to the regional procurator's office in that municipality and that the outcome of the investigations is as yet unknown. The Committee also notes that the State party does not deny the existence of the complaints filed either with the second criminal circuit court of Turbo or with the regional procurator's office, but merely states that no investigation has been initiated. The Committee further notes that the State party merely indicates that other domestic remedies exist, but without specifying which nor before which authorities appeals should be lodged. In this connection, the Committee again points out that domestic judicial remedies must not only be available but also effective. The Committee considers that it has not been shown that domestic judicial remedies have been effective.

6.4 With regard to the proceedings before the administrative court concerning the claim for damages, the Committee doubts whether a claim for damages before the administrative court constitutes the only possible remedy for a person experiencing this type of violation. The Committee further notes that in this case implementation of domestic remedies has been unduly prolonged, the administrative court having taken nine years to reach a decision at first instance.

6.5 With regard to the author's claims that article 17, paragraph 1, has been violated, the Committee considers that the author did not raise this issue in domestic courts prior to submitting it to the Committee. Consequently, this part of the communication is inadmissible in accordance with the provisions of article 5, paragraph 2 (b), of the Optional Protocol.

6.6 Consequently, the Committee declares the rest of the communication to be admissible and proceeds to a consideration of the merits in the light of the information made available to it by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

7.1 The author claims that article 9, paragraph 1, of the Covenant has been violated, insofar as the State party was obligated, in view of the death threats that had been made against him, to take the necessary measures to ensure his personal safety and did not do so. The Committee recalls its jurisprudence[3] regarding article 9, paragraph 1, and reiterates that the Covenant also protects the right to security of persons not deprived of their liberty. An interpretation of article 9 which would allow a State party to ignore known threats to the lives of persons under its jurisdiction solely on the grounds that those persons are not imprisoned or detained would render the guarantees of the Covenant totally ineffective.

7.2 In the case in question, Mr. Jiménez Vaca had an objective need for the State to take steps to ensure his safety, given the threats made against him. The Committee takes note of the State party's observations, set out in paragraph 5.1, but notes that the State party does not refer to the complaint which the author claims to have filed with the regional procurator's office in Turbo or before the regional office of the administrative security department of Turbo, nor does it offer any argument to show that the so-called "extortion" did not begin as a result of the complaint concerning death threats which the author filed with the Turbo second criminal circuit court. The Committee must also consider the fact that the State party does not deny the author's allegations that there was no reply to his request that the threats should be investigated and his protection guaranteed. The attempt on the author's life subsequent to the threats confirms that the State party did not take, or was unable to take, adequate measures to guarantee Mr. Asdrúbal Jiménez's right to security of person as provided for in article 9, paragraph 1.

7.3 With regard to the author's claim that article 6, paragraph 1, was violated insofar as the very fact that an attempt was made on his life is a violation of the right to life and the right not to be arbitrarily deprived of life, the Committee points out that article 6 of the Covenant implies an obligation on the part of the State party to protect the right to life of every person within its territory and under its jurisdiction. In the case in question, the State party has not denied the author's claims that the threats and harassment which led to an attempt on his life were carried out by agents of the State, nor has it investigated who was responsible. In the light of the circumstances of the case, the Committee considers that there has been a violation of article 6, paragraph 1, of the Covenant.

7.4 With regard to the author's claims that paragraphs 1 and 4 of article 12 have been violated, the Committee notes the observations of the State party whereby the State cannot be held responsible for the loss of other rights which may be indirectly affected as a result of violent acts. Nevertheless, considering the Committee's view that the right to security of person (art. 9, para. 1) was violated and that there were no effective domestic remedies allowing the author to return from involuntary exile in safety, the Committee concludes that the State party has not ensured to the author his right to remain in, return to and reside in his own country. Paragraphs 1 and 4 of article 12 of the Covenant were therefore violated. This violation necessarily has a negative impact on the author's enjoyment of the other rights ensured under the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 6, paragraph 1, article 9, paragraph 1, and article 12, paragraphs 1 and 4.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Luis Asdrúbal Jiménez Vaca with an effective remedy, including compensation, and to take appropriate measures to protect his security of person and his life so as to allow him to return to the country. The Committee urges the State party to carry out an independent inquiry into the attempt on his life and to expedite the criminal proceedings against those responsible for it. The State party is also under an obligation to try to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views. In addition, the State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] As is apparent from the decision of the Antioquía Administrative Court of 8 July 1999, in his claim the author alleges that his right to freedom and security was violated as a result of the threats to which he was subjected and because of which he himself requested protection, and on account of the attack he later suffered.

[2] Communication No. 612/1995, José Vicente and Amado Villafañe Chapparro, Dioselina Torres Crespo, Hermes Enrique Torres Solis and Vicencio Chaparro Izquierdo v. Colombia, Views adopted on 19 August 1997.

[3] Communication No. 195/1985, William Eduardo Delgado Páez v. Colombia, Views adopted on 12 July 1990.

X. Communication No. 865/1999, Marín Gómez v. Spain (Views adopted on 22 October 2001, seventy-third session)*

Submitted by: Mr. Alejandro Marín Gómez (represented by counsel, Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 20 July 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 October 2001,

Having concluded its consideration of Communication No. 865/1999 submitted to the Human Rights Committee by Mr. Alejandro Marín Gómez under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 20 July 1998 is Mr. Alejandro Marín Gómez, a Spanish citizen who claims to be the victim of violations by Spain of articles 14, paragraph 1, 25 (c) and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil and Mr. Maxwell Yalden.

The text of an individual opinion signed by one Committee member, Ms. Christine Chanet, is appended to this document.

The facts as submitted by the author

2.1 The author joined the Guardia Civil on 1 March 1981, when he was 19,[1] and remained on active duty until 15 November 1990, when he went on "active reserve" status owing to the loss of psychological and physical fitness.[2] On 15 November 1994, when he had been in the active reserve for four years, the District Military Medical Court handed down a ruling unanimously recognizing him as fit for active duty.[3]

2.2 In a decision dated 28 April 1995, the Ministry of Defence rejected the application the author made to return to active duty in February 1995. The decision was based on the fact that "the transitional provision in question, which allows a return to active duty, does not apply to the person in question because the reason for his change to active reserve status was not that referred to in article 4, paragraph 1 (a), of Act No. 20/1981,[4] but, rather, psychological and physical unfitness, as referred to in article 4, paragraph 1 (d)".

2.3 The author applied for judicial review against the decision by the Ministry of Defence dated 28 April 1995; the application was ruled on by the Fifth Administrative Law Division of the National High Court on 28 February 1997, which upheld the decision by the Ministry of Defence. That Division based its decision on the fact that, unlike the acceptance of the return to active duty of persons who were on reserve status for reasons of age, the rejection of the return to active duty by persons who were on active reserve status owing to the loss of psychological and physical fitness, which was later recovered, does not involve a violation of the right to equal access to public service. The National High Court concluded that the two situations are different and that there is thus no discrimination.

2.4 The author filed a remedy of amparo, which was rejected by the Constitutional Court on 3 November 1997 on the grounds that the ruling in question is not contrary to the principle of equality, since it deals with different problems on the basis of different criteria.

The complaint

3.1 The author considers that the rights provided for in articles 25 (c) and 26 of the Covenant were violated when he was prevented from returning to active duty in the Guardia Civil after being declared fit by a Medical Court following the illness which had led to his change to reserve status, since reincorporation is allowed for civil guards who were on active reserve status for reasons of age. In this regard, the author maintains that the second transitional provision of Act No. 28/1994[5] creates discrimination. It is also contrary to the right to access to public service in the Guardia Civil, which must be performed in conditions of equality.

3.2 The author considers it contrary to articles 14, paragraph 1, and 26 of the Covenant that, in the amparo proceedings in the Constitutional Court, he was denied the possibility of appearing without being represented by counsel,[6] since article 81.1 of the Court's Organizational Act enables persons who hold law degrees to appear in amparo proceedings without counsel, whereas persons who do not hold law degrees must be assisted by counsel.

Observations by the State party on admissibility

4. In its observations of 19 June 1999, the State party contests the admissibility of the communication on the grounds that the author was always assisted by a lawyer and a counsel and never complained of being a victim of any violation. Consequently, the author cannot claim that he is a victim of a violation, since he never made such an allegation before the Constitutional Court.

Comments by the author on admissibility

5.1 In his comments of 1 September 1999, the author replies to the observations by the State party on admissibility and makes it clear that, on 3 April 1997, he requested the Constitutional Court to exempt him from using counsel, in accordance with article 2, paragraph 3, of the Covenant and article 14 of the Spanish Constitution.

5.2 The Constitutional Court rejected that request on 21 April 1997, warning the author that, if he did not appear with counsel within 10 days, the application would be declared inadmissible and dismissed.

Observations by the State party on the merits

6.1 In its observations of 5 October 1999, the State party, referring to the alleged violation of article 25 (c), maintains that, since the author joined the Guardia Civil as an official and receives the salary of a Guardia Civil officer, it is obvious that he has not been denied access to public service. It considers that the author is mixing up "access to public service", a right guaranteed by article 25 (c) of the Covenant, and changes of administrative situation within the public service, which are not covered by the Covenant. What the case brought by the author thus involves is not access to public service, but, rather, a change from one administrative situation to another within the public service.

6.2 With regard to the allegations under article 26 of the Covenant, the State party contests the fact that, according to the author, changing from active duty status is allowed when the change to reserve status took place for reasons of age, not for reasons of illness. According to the State party, the author has mixed up the legal regulations and it explains that active reserve status, as provided for by Act No. 20/1981, disappeared with Act No. 28/1994 of 18 October, whose seventh transitional provision states that "Guardia Civil personnel who are on active reserve status shall be moved to reserve status." It is also not possible to change from reserve status to active duty status.[7]

6.3 Act No. 20/1994 entered into force on 20 January 1995. According to the State party, the author was declared fit for active duty on 15 November 1994 and he was informed of the agreement of the Medical Court on 15 December 1994. Until 20 January 1995, the author was still on active reserve status and could have requested his return to active duty, but he did not do so until 23 February 1995, when he was still on reserve status and the preceding paragraph was applicable to him.

6.4 A temporary exception was made to this prohibition on changing from reserve to active duty and, according to the State party, the author fails to mention it. In accordance with Act No. 20/1981, the Guardia Civil could change to active reserve status for reasons, inter alia, of age or illness. In accordance with Act No. 28/1994, active reserve status became reserve status and the Guardia Civil could change to reserve status, inter alia, for reasons of age or for reasons of illness. However, the author fails to say that, in addition to replacing active reserve status by reserve status, Act No. 28/1994 delays the change to reserve status until age 56.[8] This delay in the age for changing to reserve status affects only those who changed or considered changing to the former active reserve status for reasons of age.

6.5 The State party concludes that the law does not discriminate between civil guards on reserve status for reasons of illness or age, but merely replaces active reserve status by reserve status and raises the age for changing to reserve status. Moreover, this delay, from 50 to 56 years, affects all those who changed or were considering the possibility of changing to reserve status when they reached age 50. For this purpose, the law allows them one month either to request a change to reserve status, even though they have not reached age 56, or to return to active duty from reserve status, which they went on when they reached age 50 and which the law delays until age 56.

Comments by the author on the merits

7.1 In his comments dated 28 January 2000, the author replies to the State party's allegations as to the merits and reaffirms, with regard to article 25 (c) of the Covenant, that, although he was on active reserve status, he was prevented from carrying out the functions of a civil guard. He also emphasizes that the case brought by the Ministry of Defence is clearly discriminatory, since, if he had been on active reserve status for reasons of age, he would be able to return to active duty, but he cannot do so because he went on active reserve status as a result of an illness and even though he was less than 50.

7.2 With regard to article 26, the author states that the decision by the Ministry of Defence refers to the second transitional provision of Act No. 28/1994 and that that provision is not applicable to him because he changed to active reserve status not for reasons of age, but because of psychological and physical unfitness, as already indicated in paragraph 2.2. The author therefore considers that the transitional provision in question is discriminatory, since there is no difference in treatment based on objective and reasonable criteria.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's observations on admissibility, in which it claims that the author never objected in the national courts to the need for counsel. The Committee nevertheless considers that the fact that the author requested the Constitutional Court to exempt him from using counsel proves that he did exhaust this remedy.

8.4 With regard to the allegations of the violation of articles 14, paragraph 1, and 26 of the Covenant on the grounds that the author was denied the possibility of appearing before the Constitutional Court without being represented by counsel, the Committee considers that the information provided by the author does not describe a situation which comes within the scope of those articles. The author claims that it is discriminatory not to require persons holding law degrees to appear before the Constitutional Court through counsel when persons who do not hold law degrees must meet this requirement. The Committee refers to its jurisprudence[9] and recalls that, as the Constitutional Court itself argued, the requirement of counsel reflects the need for a person with knowledge of the law to be responsible for handling an application to that Court. As to the author's allegations that such a requirement is not based on objective and reasonable criteria, the Committee considers that the allegations have not been properly substantiated for the purposes of admissibility. Consequently, this aspect of the communication is inadmissible under article 2 of the Optional Protocol.

8.5 The Committee declares the rest of the communication admissible and will consider it as to the merits.

Consideration as to the merits

9.1 The Human Rights Committee has considered the present communication in the light of the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's allegations that he is a victim of a violation of article 26 of the Covenant, the Committee notes that he was declared fit for active duty on 15 November 1994 and that he was notified of the Medical Court's agreement on 15 December. However, the author did not request a transfer to active duty at that time. The Committee notes that new Act No. 20/1994 entered into force on 20 January 1995 and that it eliminated the "active reserve status" category, leaving only the "reserve status" category, which, according to article 103 of Act No. 17/1989, does not allow military personnel on reserve status to change to active duty. The Committee notes that the author was affected by Act No. 20/1994 only to the extent that, as of 20 January 1995, he could not request a transfer to active duty. The Committee also notes that, since the author did not take the opportunity to request a transfer to active duty prior to 20 January 1995, the situation is of his own making, not that of the State party. The Committee takes note of the author's allegation that Act No. 20/1994 is discriminatory because it allows a return to active duty only for persons who went on reserve status for reasons of age. However, the Committee considers that this Act is not discriminatory, since it merely extends the retirement age to 56 years and allows persons who went on active reserve status at age 50 to apply to return to active duty, as provided for by law, and then base themselves on the new age to change to reserve status. Consequently, the Committee takes the view that the facts as submitted by the author do not disclose a violation of article 26 of the Covenant.

9.3 For the same reasons as those cited in the preceding paragraph, the Committee considers that there has been no violation of the right to equality of access to public service, as provided for in article 25 (c) of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation by Spain of any of the provisions of the Covenant.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] He was born on 25 July 1961.

[2] Article 4, paragraph 1 (d), of Act No. 20/1981 of 6 July establishing active reserve status and setting ages of retirement for professional military personnel.

[3] He has not submitted a copy of the ruling to the secretariat.

[4] Article 4, paragraph 1 (a), refers to a change to active reserve status upon reaching the ages set in article 5 of Act No. 20/1981.

[5] Second transitional provision of Act No. 28/1994 of 18 October supplementing the Guardia Civil Staff Regulations:

> Return to active duty.
>
> If, on the date of the entry into force of the present Act pursuant to the provisions of Act No. 20/1981 of 6 July establishing active reserve status and setting ages of retirement for professional military personnel, members of the Guardia Civil who are younger than the age provided for in the present Act are on active reserve status, they may request a return to active duty within one month as from the entry into force of the present Act and must remain on active duty status continuously for at least two years. Those who, at the time of the request, cannot complete the minimum period of active duty required before reaching the age for changing to reserve status provided for in article 11 of this Act may not return to active duty.
>
> The return option provided for in the preceding paragraph may be exercised only by those members of the Guardia Civil who are on active reserve status in accordance with article 4, paragraph 1 (a), of Act No. 20/1981.

[6] A counsel has a law degree and belongs to the Bar Association. His functions are to act as representative in most court cases, to be held liable for costs and to participate actively in all proceedings.

[7] Article 103, paragraph 7, of Act No. 17/1989 of 19 July:

> "A member of the military on reserve status may change only to special service status, unpaid leave, suspended employment and suspension from functions."

[8] Act No. 20/1981 allowed that move until age 50 only.

[9] Marina Torregruesa Lafuente et al. v. Spain, decision of 16 July 2001.

APPENDIX

Individual opinion of Committee member Ms. Christine Chanet (dissenting)

I disagree with the Committee's decision taken on the grounds given in paragraph 8.4.

The privilege allowed to law graduates under the Spanish civil procedure, which does not require them to be represented by counsel in court proceedings, in my view raises prima facie a question regarding articles 2, 14 and 26 of the Covenant.

It is possible that the State party may put forward convincing arguments to justify the reasonableness of the criteria applied, both in principle and in practice.

Only an examination of the case on the merits, however, might have yielded the answers required for any serious consideration of the case.

(Signed) Christine Chanet

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Y. Communication No. 899/1999, Francis et al. v. Trinidad and Tobago (Views adopted on 25 July 2002, seventy-fifth session)*

Submitted by:	Mr. Glenroy Francis et. al. (represented by counsel Mr. Saul Lehrfreund)
Alleged victim:	The authors
State party:	Trinidad and Tobago
Date of communication:	14 May 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2002,

Having concluded its consideration of Communication No. 899/1999, submitted to the Human Rights Committee by Mr. Glenroy Francis, Mr. Neville Glaude and Mr. Keith George under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 29 May 1997, are Glenroy Francis, Neville Glaude and Keith George, currently serving terms of 75 years' imprisonment at State prison, Trinidad. They claim to be victims of violations by Trinidad and Tobago[1] of articles 2, paragraph 3, 7, 9, paragraph 3, 10, paragraph 1, 14, paragraphs 1, 3 (c) and 5, of the International Covenant on Civil and Political Rights. They are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of a partly dissenting individual opinion by Committee member Mr. Hipólito Solari Yrigoyen is appended to this document.

The facts as presented by the authors

2.1 Messrs. Francis, Glaude and George were arrested on 24 July 1986, 23 July 1986 and 24 May 1987 respectively for suspicion of murder on 19 July 1986 of one Ramesh Harriral. Until their trial in November 1990, the authors were detained at the remand section of Golden Grove Prison, Arouca, in a cell measuring 9 feet by 6 feet with between 8 to 15 other inmates.

2.2 After a period of four years and three months for Messrs. Francis and Glaude, and of three years and five months for Mr. George, the authors were tried between 6 and 30 November 1990, convicted by unanimous jury verdict and sentenced to death for the murder charged. From their conviction on 30 November 1990 until the commutation of their sentences on 3 March 1997, the authors were confined on death row at Port-of-Spain Prison, Trinidad. They were detained in solitary confinement in a cell measuring 9 feet by 6 feet, containing an iron bed, mattress, bench and table.[2]

2.3 In the absence of sanitation facilities in the cell, a plastic pail was provided as toilet. A small ventilation hole, measuring 8 inches by 8 inches, provided scarce and inadequate ventilation. The only light provided was by a fluorescent strip illuminated 24 hours a day located outside the cell above the door. The authors remained locked inside their cell continuously, save for collecting food, bathing, and slopping out the contents of their plastic pail. They enjoyed exercise outside their cell approximately once a month only in handcuffs. They were allowed only a limited numbers of personal items, excluding radios, and access to writing and reading material remained very limited. Mr. Francis further stated that he had no right to see copies of the Prison Rules, that he was not allowed to write to the Ministry of National Security complaining as to his conditions of detention, that doctors' visits were irregular and that letters to his family had been intercepted and not processed without explanation. Mr. Glaude also stated that poor food had resulted in significant weight loss, and that no medicine had been provided to him.

2.4 On 10 October 1994, the authors applied for leave to appeal against their convictions to the Court of Appeal of Trinidad and Tobago. The Court of Appeal dismissed their application for leave on 13 March 1995. The authors' petitions to the Judicial Committee of the Privy Council for Special Leave to Appeal as Poor Persons were dismissed on 14 November 1996. On 3 March 1997 the authors' death sentences were commuted to 75 years' imprisonment.

2.5 From that point, the authors have been detained in Port-of-Spain Prison in conditions involving confinement to a cell measuring 9 feet by 6 feet together with 9 to 12 other prisoners. It is stated that such overcrowding leads to violent confrontations amongst the prisoners. One single bed is provided for the cell and therefore the authors sleep on the floor. One plastic bucket is provided as slop pail and is emptied once a day, such that it sometimes overflows or is spilled over. Inadequate ventilation consists of a 2 foot by 2 foot barred window. The prisoners are locked in their cell, on average 23 hours a day, with no educational opportunities, work or reading materials. The location of the prison food-preparation area, around 2 metres from where the prisoners empty their slop pails, creates an obvious health hazard. The quantity and quality of food are said not to meet the authors' nutritional needs, and the complaint mechanisms for prisoners are inadequate.

The complaint

3.1 The authors' complaints focus on alleged excessive delays in the judicial process in their case, and on the conditions of detention endured by them at various stages in that process.

3.2 As to the allegation of delay, the authors contend that their rights under articles 9, paragraph 3, and 14, paragraph 3 (c), were violated by the delay of four years and three months in bringing Messrs. Francis and Glaude to trial, and the delay of three years and five months in bringing Mr. George to trial. These were the periods from the authors' arrests on 19 July 1986, 23 July 1986 and 24 May 1987, until the commencement of their trial on 6 November 1990. Accordingly, they argue that the delay was unreasonable.

3.3 The authors cite the Committee's Views in Celiberti de Casariego v. Uruguay, Millan Sequeira v. Uruguay and Pinkney v. Canada,[3] where comparable periods of delay were found to be in violation of the Covenant. Relying on Pratt Morgan v. Attorney-General of Jamaica,[4] the authors argue that the State party is responsible for avoiding such periods of delay in its criminal justice system, and it is therefore culpable in this case. The authors contend that the delay was aggravated by the fact that there was little investigation that had to be performed by the police and that the evidence against them consisted simply of direct eyewitness testimony, statements under caution made by the authors, and forensic or scientific evidence bearing certificates of analysis dated between 24 July and 12 August 1986.

3.4 The authors also allege violations of articles 14, paragraphs 1, 3 (c) and 5, in the unreasonably protracted delay of over four years and three months which elapsed before the Court of Appeal heard and dismissed their appeal. The authors cite a variety of cases in which the Committee found comparable delays (as well as shorter ones) in breach of the Covenant.[5] The authors submit that in assessing the reasonableness of the delay it is relevant to consider the fact that they were under sentence of death, and detained throughout in unacceptable conditions.

3.5 The second portion of the complaint relates to the conditions of detention described above which the authors experienced post-conviction and, currently, post-commutation. These conditions are said to have been repeatedly condemned by international human rights organizations as breaching internationally accepted standards of minimum protection.[6] The authors claim that after their commutation, they remain in conditions of detention in manifest violation of, inter alia, a variety of both domestic Prison Rules standards and United Nations Standard Minimum Rules for the Treatment of Prisoners.[7]

3.6 Relying on the Committee's General Comments 7 and 9 on articles 7 and 10, respectively, and further on a series of communications where conditions of detention were found to violate the Covenant,[8] the authors argue that the conditions endured by them at each phase of the proceedings breached a minimum inviolable standard of detention conditions (to be observed regardless of a State party's level of development) and accordingly violated articles 7 and 10, paragraph 1 of the Covenant. In particular, the authors refer to the case of Estrella v. Uruguay,[9] where the Committee relied, in determining the existence of inhuman treatment at Libertad Prison, in part on "its consideration of other communications which confirms the existence of a practice of inhuman treatment at Libertad". In Neptune v. Trinidad and Tobago,[10] the Committee found circumstances very similar to the present case to be incompatible with article 10, paragraph 1, and called on the State party to improve the general conditions of detention in order to avoid similar violations in the future. The authors underscore their claim of violation of articles 7 and 10, paragraph 1, by reference to international jurisprudence finding inappropriately severe conditions of detention to constitute inhuman treatment.[11]

3.7 Finally, the authors allege a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3, in that they are being denied the right of access to court to raise the above issues. The authors submit that the right to present a constitutional motion is not effective in the circumstances of the present case, owing to the prohibitive cost of instituting proceedings in the High Court to obtain constitutional redress, the absence of legal aid for constitutional motions and the well-known dearth of local lawyers willing to represent applicants free of charge. The authors cite the case of Champagnie et al. v. Jamaica[12] to the effect that in the absence of legal aid, a constitutional motion did not constitute an effective remedy for the indigent author in that case. The authors cite jurisprudence of the European Court of Human Rights[13] for the proposition that effective right of access to a court may require the provision of legal aid for indigent applicants. The author submits this is particularly pertinent in a capital case, and thus argues the lack of legal aid for constitutional motions per se violates the Covenant.

The State party's submissions on the admissibility and merits

4. Notwithstanding the Committee's request to the State party by note verbale of 30 November 1999, and the Secretariat's reminders of 18 December 2001, 26 February 2001 and 10 October 2001, the State party has not made any submission on the admissibility and/or the merits of the case.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol, and that available domestic remedies have been exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol. In the absence of any information provided by the State party, the Committee considers that the authors have substantiated their claims sufficiently, for the purposes of admissibility.

5.3 Accordingly, the Committee finds the communication admissible and proceeds to an examination of the substance of those claims in the light of all the information made available to it by the authors, as required by article 5, paragraph 1, of the Optional Protocol. The Committee notes with concern the lack of any cooperation on the part of the State party, both in respect of the admissibility and the substance of the authors' allegations. It is implicit in rule 91 of the rules of procedure and article 4, paragraph 2, of the Optional Protocol, that a State party to the

Covenant should investigate in good faith all the allegations of violations of the Covenant made against it, and is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State. In the circumstances, due weight must be given to the authors' allegations, to the extent that they have been substantiated.

Consideration of the merits

5.4 As to the claim of unreasonable pre-trial delay, the Committee recalls its jurisprudence that "[i]n cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible".[14] In the present case, where the factual evidence was straightforward and apparently required little police investigation, the Committee considers that very exceptional reasons must be shown to justify delays of four years and three months, and three years and five months, respectively, until trial. In the absence of any justification advanced by the State party for these delays, the Committee concludes that the authors' rights under article 9, paragraph 3, and article 14, paragraph 3 (c), of the Covenant have been violated.

5.5 As to the claim of a delay of four years and three months between conviction and the judgement on appeal, the Committee notes that the authors lodged their application for leave to appeal in November 1994, and that the Court disposed of the appeal some five months later in March 1995. In the absence of any argument by the authors that responsibility for the delay in lodging the appeal could be imputed to the State party, the Committee is unable to find that there has been a violation of article 14, paragraphs 3 (c) and 5, of the Covenant.

5.6 As to the authors' claims that the conditions of detention in each phase of their imprisonment violated articles 7 and 10, paragraph 1, in the absence of any responses by the State party to the allegations concerning the conditions of detention as described by the authors, the Committee must give due consideration to the authors' allegations since they have not been properly refuted. The Committee considers that the authors' conditions of detention as described violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

5.7 As to the authors' claims under article 14, paragraph 1, in conjunction with article 2, paragraph 3, in that they are being denied the right of access to court to press the above claims, the Committee considers that, in light of its findings above, it is not necessary to decide on this issue.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9, paragraph 3, 10, paragraph 1, and 14, paragraph 3 (c), of the Covenant.

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation. In the light of the long years spent by the authors in deplorable conditions of detention that violate article 10 of the Covenant, the State party should consider release of the authors. The State party should, in any event, improve the conditions of detention in its prisons without delay, in order to bring the authors' conditions of detention into line with article 10 of the Covenant.

8. On becoming a State party to the Optional Protocol, Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with article 12 (2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Initially, the Optional Protocol entered into force for Trinidad and Tobago on 14 February 1981. On 26 May 1998, the Government of Trinidad and Tobago denounced the Optional Protocol to the International Covenant on Civil and Political Rights. On the same day, it re-acceded, including in its instrument of re-accession a reservation "to the effect that the Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith". On 2 November 1999, the Committee decided that this reservation was not valid, as it was not compatible with the object and purpose of the Optional Protocol. On 27 March 2000, the Government of Trinidad and Tobago denounced the Optional Protocol again.

[2] Counsel's description of these conditions of confinement on death row is derived from a visit by him to, and interviews with, the authors on 15 July 1996. The description of conditions post-commutation is derived from counsel's visits to, and interviews with, *other* prisoners at the same prison on the same day.

[3] Communication Nos. 56/1979, 6/1977 and 27/1978 respectively.

[4] [1994] 2 AC 1 (Privy Council).

[5] The authors refer to Pinkney v. Canada (Communication No. 27/1978), Little v. Jamaica (Communication No. 283/1998), Pratt and Morgan v. Jamaica (Communication Nos. 210/1986 and 226/1987), Kelly v. Jamaica (Communication No. 253/1987) and Neptune v. Trinidad and Tobago (Communication No. 523/1992).

[6] The authors refer to a general analysis of conditions in Port-of-Spain described in Vivian Stern, Deprived of their Liberty (1990).

[7] The author also refers, in terms of the general situation, to a media quotation of 5 March 1995 of the General Secretary of the Prison Officers' Association to the effect that sanitary conditions are "highly deplorable, unacceptable and pose a health hazard". He also stated that limited resources and the spread of serious communicable diseases make a prison officer's job more harrowing.

[8] Valentini de Bazzano v. Uruguay (Communication No. 5/1977), Buffo Carballal v. Uruguay (Communication No. 33/1978), Sendic Antonaccio v. Uruguay (Communication No. 63/1979), Gomez De Voituret v. Uruguay (Communication No. 109/1981), Wight v. Madagascar (Communication No. 115/1982), Pinto v. Trinidad and Tobago (Communication No. 232/1987), Mukong v. Cameroon (Communication No. 458/1991)

[9] Communication No. 27/1980.

[10] Communication No. 532/1992. The conditions described include a six foot by nine foot cell with six to nine fellow prisoners, with three beds, insufficient light, half an hour of exercise every two or three weeks and inedible food.

[11] Reference was made to the jurisprudence on article 3 of the European Court of Human Rights, and to the Supreme Court of Zimbabwe in Conjwayo v. Minister of Justice, Legal and Parliamentary Affairs et al. (1992) 2 SA 56, Gubay CJ for the Court.

[12] Communication No. 445/1991, declared admissible on 18 March 1993.

[13] Golder v. United Kingdom [1975] 1 EHRR 524 and Airey v. Ireland [1979] 2 EHRR 305. The author also cites the Committee's Views in Currie v. Jamaica (Communication No. 377/1989) to the effect that, where the interests of justice require, legal assistance should be available to a convicted applicant to pursue a constitutional motion in respect of irregularities in a criminal trial.

[14] Barroso v. Panama (Communication No. 473/1991, at 8.5)

APPENDIX

Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (dissenting in part)

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation. In the light of the long years spent by the authors in deplorable conditions of detention that violate article 10 of the Covenant, the State party should release the authors. The State party should, in any event, improve the conditions of detention in its prisons without delay, in order to bring the authors' conditions of detention into line with article 10 of the Covenant.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Z. Communication No. 902/1999, Joslin v. New Zealand (Views adopted on 17 July 2002, seventy-fifth session)*

Submitted by:	Ms. Juliet Joslin et al. (represented by counsel Mr. Nigel C. Christie)
Alleged victim:	The author
State party:	New Zealand
Date of communication:	30 November 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2002,

Having concluded its consideration of Communication No. 902/1999, submitted to the Human Rights Committee by Ms. Juliet Joslin et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Juliet Joslin, Jennifer Rowan, Margaret Pearl and Lindsay Zelf, all of New Zealand nationality, born on 24 October 1950, 27 September 1949, 16 November 1950, and 11 September 1951 respectively. The authors claim to be victims of a violation by New Zealand of articles 16; 17, on its own and in conjunction with article 2, paragraph 1; 23, paragraph 1, in conjunction with article 2, paragraph 1; 23, paragraph 2, in conjunction with article 2, paragraph 1; and 26. The authors are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of a concurring individual opinion signed by Mr. Rajsoomer Lallah and Mr. Martin Scheinin is appended to this document.

The facts as presented by the authors

2.1 Ms. Joslin and Ms. Rowan commenced a lesbian relationship in January 1988. Since that point, they have jointly assumed responsibility for their children out of previous marriages. In living together, they have pooled finances and jointly own their common home. They maintain sexual relations. On 4 December 1995, they applied under the marriage act 1955 to the local registrar of births, deaths and marriages for a marriage licence, by lodging a notice of intended marriage at the local registry office. On 14 December 1995, the deputy Registrar-General rejected the application.

2.2 Similarly, Ms. Zelf and Ms. Pearl commenced a lesbian relationship in April 1993. They also share responsibility for the children of a previous marriage, pool financial resources and maintain sexual relations. On 22 January 1996, the local registry office refused to accept a notice of intended marriage. On 2 February 1996, Ms. Zelf and Ms. Pearl lodged a notice of intended marriage at another registry office. On 12 February 1996, the Registrar-General informed them that the notice could not be processed. The Registrar-General indicated that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman.

2.3 All four authors thereupon applied to the High Court for a declaration that, as lesbian couples, they were lawfully entitled to obtain a marriage licence and to marry pursuant to the Marriage Act 1955. On 28 May 1996, the High Court declined the application. Observing inter alia that the text of article 23, paragraph 2, of the Covenant "does not point to same-sex marriages", the Court held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only.

2.4 On 17 December 1997, a Full Bench of the Court of Appeal rejected the authors' appeal. The Court held unanimously that the Marriage Act, in its terms, clearly applied to marriage between a man and a woman only. A majority of the Court further went on to hold that the restriction in the Marriage Act of marriage to a man and a woman did not constitute discrimination. Justice Keith, expressing the majority's views at length, found no support in the scheme and text of the Covenant, the Committee's prior jurisprudence, the travaux préparatoires nor scholarly writing[1] for the proposition that a limitation of marriage to a man and a woman violated the Covenant.

The complaint

3.1 The authors claim a violation of article 26, in that the failure of the Marriage Act to provide for homosexual marriage discriminates against them directly on the basis of sex and indirectly on the basis of sexual orientation. They state that their inability to marry causes them to suffer "a real adverse impact" in several ways: they are denied the ability to marry, a basic civil right, and are excluded from full membership of society; their relationship is stigmatized and there can be detrimental effects on self-worth; and they do not have ability to choose whether or not to marry, like heterosexual couples do.

3.2 The authors contend that the differentiation contained in the Marriage Act cannot be justified on any of a variety of grounds that the State might advance. These are that marriage centres on procreation, and homosexuals are incapable of procreation; that recognition of homosexual marriage would validate a particular "lifestyle"; that marriage is consistent with public morality; that marriage is an institution of longevity; that alternative forms of contractual/private arrangements are available; that an extension of current marriage would open "floodgates" dangers; that marriage is an optimum construct for parenting; and that Parliament's democratic decision should be accorded deference.

3.3 By way of rebuttal of these possible justifications, the authors note, firstly, that procreation does not lie at the heart of marriage, and is not a necessary indicium for marriage in New Zealand law. In any event, lesbians could procreate utilizing reproductive technologies, and to allow homosexual marriage would not affect the procreative capacity of heterosexuals. Secondly, there is no such thing as homosexual "lifestyle". In any event, the Marriage Act does not sanction particular lifestyles, and there is no evidence any hypothetical homosexual lifestyle contains elements which would justify an inability to marry. Thirdly, in accordance with the "Siracusa Principles on the Limitation and Derogation Provisions of the ICCPR",[2] public morality cannot justify discrimination contrary to the Covenant. In any event, so argue the authors, New Zealand public morality does not support exclusion of homosexuals from marriage.

3.4 Fourthly, longevity or tradition cannot justify discrimination. In any case, historical research shows that various societies in different parts of the world, have at different times, recognized homosexual unions.[3] Fifthly, if homosexuals should have to enter contractual or other private arrangements to confer upon themselves the benefits that flow from marriage, heterosexuals should be required to bear the same costs. In any event, in New Zealand contractual arrangements would not confer the full benefits of marriage. Sixthly, it would not follow from a permission of homosexual marriage that polygamous or incestuous marriages would also have to be permitted. There are other reasons for not permitting such marriages that are not present in the case of homosexual marriages. Seventhly, the authors contend that North American social science research has demonstrated that the effect of homosexual parenthood on children is not markedly different from that of heterosexual parents, including in the area of sexual identity and mental and emotional well-being.[4] In any event, it is already the case, as with the authors, that homosexual couples are caring for children. Finally, the authors argue that no deference should be shown to democratic will, as expressed by the national authorities, in particular, the legislature, of a State party, as a human rights issue is involved.[5]

3.5 The authors also claim a violation of article 16. They argue that article 16 is aimed at permitting persons to assert their essential dignity, through their recognition as proper subjects of law, both as individuals and as members of a couple. The Marriage Act, in preventing the authors from acquiring the legal attributes and advantages flowing from marriage, including advantages in the law of adoption, succession, matrimonial property, family protection and evidence, deprives the authors of access to a significant institution through which individuals acquire and exercise legal personality.

3.6 The authors further claim a violation of article 17, both on its own and in conjunction with article 2, paragraph 1, in that the restriction of marriage to heterosexual couples violates the authors' rights to family and privacy. The authors contend that their relationships display all the attributes of family life,[6] but are nonetheless denied civil recognition through marriage. This amounts to a failure on the part of the State to discharge its positive obligation to protect family life. Moreover, the failure publicly to respect the fundamental private choice of one's sexual identity and partnerships flowing from that is an interference with the notion of privacy in article 17.[7] This interference is also arbitrary, as it is discriminatory, based upon prejudice and without justification for the reasons set out above.

3.7 The authors further claim a violation of article 23, paragraph 1, in conjunction with article 2, paragraph 1. They state that their relationships exhibit all the criteria by reference to which a heterosexual family is said to exist, with the only criteria missing being legal recognition. The authors submit that article 2, paragraph 1, requires recognition of families to take place in a non-discriminatory manner, which the Marriage Act fails to do.

3.8 Finally, the authors claim a violation of article 23, paragraph 2, in conjunction with article 2, paragraph 1. They contend that the right of men and women to marry must be interpreted in the light of article 2, paragraph 1, which forbids distinctions of any kind. As the Marriage Act distinguishes on the prohibited ground of sex, which includes within its ambit sexual orientation,[8] the authors' rights in these respects have been violated. While the European Court has held that the corresponding right in the European Convention on Human Rights is limited to marriage between a man and a woman,[9] the Committee should prefer a wider interpretation. Moreover, examining the text of the Covenant, the phrase "men and women" in article 23, paragraph 2, does not mean that only men may marry women, but rather that men as a group and women as a group may marry.

3.9 As to the exhaustion of domestic remedies, the authors contend that a further appeal from the Court of Appeal to the Privy Council would be futile, as the courts cannot refuse to apply primary legislation such as the Marriage Act.

The State party's submissions on admissibility and merits

4.1 As to the exhaustion of domestic remedies, the State party rejects the authors' claims of futility in pursuing a further appeal to the Privy Council, noting that it would be open to the Privy Council to construe the terms of the Marriage Act as permitting a lesbian marriage. The State party notes that the lower courts considered the statutory meaning of the Act clear, and that there was no finding of any inconsistency with the Bill of Rights Act and the right to non-discrimination contained therein. The question before the local courts was one of statutory interpretation, and the Privy Council would be well able to come to a contrary conclusion as to the proper meaning of the Act. The State party expressly declines, however, to draw a conclusion as to the admissibility of the communication on this or any other grounds.

4.2 As to the merits, the State party rejects the authors' arguments that the Covenant requires States parties to enable homosexual couples to marry, noting that such an approach would require redefinition of a legal institution protected and defined by the Covenant itself, and of an institution reflective of the social and cultural values in the State party which are consistent with the Covenant. The State party's law and policy protects and recognizes homosexual couples in various ways, however recognition through the institution of marriage "goes well beyond the terms of the Covenant". The State party notes that, while various States parties have instituted forms of registration for homosexual couples, *none* currently permit homosexual marriage.[10] It is the fundamental understanding of marriage in the Covenant, in other international instruments such as the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as in New Zealand law, as being between a man and a woman.

4.3 The State party's overarching argument is that the terms of article 23, paragraph 2, of the Covenant clearly envisage that marriage may properly be defined in terms of couples of opposite sexes. The ordinary meaning of the words "to marry" refers to couples of opposite sexes.[11] Significantly, article 23, paragraph 2, is the only substantive right protected under the Covenant expressed in the gender-specific terms of "men and women", with all other rights expressed in gender-neutral terms.[12] This contextual reading is strengthened by the word "spouse", connoting parties to a marriage of opposite sexes, in article 23, paragraphs 3 and 4. The universal consensus of State practice supports this view: no States parties provide for homosexual marriage; nor has any State understood the Covenant to so require and accordingly entered a reservation.

4.4 The State party observes that this reading of article 23, paragraph 2, is consistent with the travaux préparatoires of the Covenant. Article 23 was drawn directly from article 16 of the Universal Declaration of Human Rights, which provides, in the only gender-specific reference in the Declaration, to the right of "[m]en and women … to marry". The travaux préparatoires of article 23 also contain repeated references to "husband and wife".[13] Such an interpretation is also confirmed by respected academic commentary,[14] and by decisions of the European Court of Human Rights which have repeatedly found that the equivalent provision of the European Convention does not extend to homosexual couples.[15]

4.5 The State party emphasizes that the specific terms of article 23, paragraph 2, in clearly referring to couples of different sex, must influence the interpretation of the other Covenant rights invoked. Following the interpretative maxim generalia specialibus non derogant, to the effect that general provisions should not detract from the meaning of specific provisions, the specific meaning of article 23, paragraph 2, excludes a contrary interpretation being derived from other more general provisions of the Covenant.

4.6 As to article 16, the State party contends that this provision confers an individual right. It is not possible to construe article 16 as creating an obligation to recognize particular forms of relationship in a given way, for the legal personality protected by article 16 is of individuals rather than of a couple or other social grouping. The travaux préparatoires and academic commentary both reinforce that article 16 is aimed at preventing a State from denying individuals the ability to enjoy and enforce their legal rights, rather than dealing with an individual's capacity to act.[16] Accordingly, article 16 cannot be understood to confer an entitlement to acquire rights consequent upon any particular legal status or to act in a particular way, such as entering into marriage, under law.

4.7 As to article 17, both on its own and in conjunction with article 2, paragraph 1, the State party refers to the Committee's General Comment 16, which states that article 17 protects against "all such interferences and attacks" on a person's expression of identity. The requirements of the Marriage Act, however, do not constitute an interference or attack on the authors' family or privacy, which are protected by general legislation governing privacy, human rights and family law. Unlike the criminal legislation at issue in Toonen v. Australia,[17] the Marriage Act neither authorizes intrusions into personal matters, nor otherwise interferes with the authors' privacy or family life, nor generally targets the authors as members of a social group. The authors are not subject to any restriction on the expression of their identity or their entry into personal relationships, but rather seek the State's conferral of a particular legal status on their relationship.

4.8 As to article 23, paragraph 1, in conjunction with article 2, paragraph 1, the State party states that, contrary to the communication's allegation, it does recognize the authors, with and without their children, as families. The law makes provision for the protection of families in a variety of ways, including law relating to protection of children, protection of family property, dissolution of marriage and so on. While some of those areas do not extend to homosexual couples, certain areas are under review[18] and a number of other measures do apply to homosexual couples,[19] in keeping with social changes and involving careful review and extensive consultation. Such differential treatment is permissible, for the Committee's jurisprudence is clear that conceptions and legal treatments of families vary widely.[20] The Committee's General Comment 19 also recognizes that law and policy relating to families may properly vary from one form of family to another.

4.9 The State party submits therefore that there is clear scope under article 23, paragraph 1, for different treatment of different forms of family. A differential treatment of families that comprise or are headed by a married couple also reflects States parties' obligations under article 23, paragraph 2, to provide for marriage as a separate institution. The State party observes that it is carrying out a programmatic review of law and policy affecting homosexual couples to ensure that social, political and cultural values remain met through its family law and practice.

4.10 As to article 23, paragraph 2, in conjunction with article 2, paragraph 1, the State party refers to its previous submissions that article 23, paragraph 2, cannot be read as extending to a right of homosexual couples to marry. In any event, the inability of homosexual couples to marry under New Zealand law does not follow from a differential treatment of homosexual couples but from the nature of the institution of marriage recognized by article 23, paragraph 2, itself.

4.11 As to article 26, the State party emphasizes that the inability of homosexual couples to marry flows directly from article 23, paragraph 2, of the Covenant and cannot, therefore, constitute discrimination in terms of article 26. Turning to the elements of discrimination under article 26, the State party argues firstly that the inability of homosexuals to marry does not follow from a distinction, exclusion or restriction but rather from the inherent nature of marriage itself. Marriage is at present universally understood as open only to individuals of opposite sexes, and is so recognized in the civil law of all other States parties to the Covenant. While in recent years some States parties have instituted forms of official recognition for homosexual relationships, none of these have been described as marriage or possesses identical legal effect. As such, the clear understanding of marriage, as underscored by the meaning of article 23, paragraph 2, is of individuals of opposite sexes.

4.11 The State party contends that the authors' attempt to interpret the principle of non-discrimination so as to redefine the institution of marriage seeks not non-discrimination but identical treatment, which goes well beyond the scope of article 26. The Covenant's travaux préparatoires also recognize that the right to non-discrimination does not require identical treatment.[21] The institution of marriage is a clear example where the substance of the law necessarily creates a difference between couples of opposite sexes and other groups or individuals, and therefore the nature of the institution cannot constitute discrimination contrary to article 26.

4.12 Secondly, in any event, the inability of homosexual couples to marry under New Zealand law is not a distinction or differentiation based on sex or sexual orientation. It is the nature of the couple, rather than of that of individual members, that is determinative. The Marriage Act grants all persons equal rights to marriage, regardless of sex or sexual orientation and does not differentiate between persons on any such basis. Rather, the Act is the provision of a defined civil status to a certain defined form of social group. In this connection the State party refers to a recent decision of the European Court of Justice, where it was held that the provision of particular benefits to couples of opposite sexes but not to homosexual couples did *not* discriminate on the grounds of sex, for the provision applied in the same manner to male and female persons.[22]

4.13 Thirdly, the State party argues that any differentiation is objectively and reasonably justified, for a purpose legitimate under the Covenant. In differentiating between homosexual couples and couples of differing sexes, the Marriage Act relies on clear and historically objective criteria and seeks to achieve the purpose of protecting the institution of marriage and the social and cultural values that that institution represents. This purpose is explicitly recognized as legitimate by article 23, paragraph 2, of the Covenant.

Comments by the authors

5.1 The authors reject the State party's submissions on admissibility and merits. As to admissibility, they contend that if the Courts found that the true meaning of the Marriage Act was nonetheless discriminatory and in violation of the Bill of Rights Act, the Courts would still be obliged to apply the Marriage Act, because primary legislation cannot be set aside on the grounds of inconsistency with the Bill of Rights Act. As to the merits, the authors contend that the Court of Appeal's decision that the Marriage Act was not discriminatory was wrong. They argue that as (i) homosexuals are treated differently from heterosexuals with respect to marriage, (ii) this differential treatment is based on sex and sexual orientation, and (iii) homosexual couples thereby suffer substantive detriment and stigmatization, the Marriage Act is discriminatory. In support, the authors cite a recent decision of the Supreme Court of British Columbia for the proposition that denial of access to marriage under Canadian law is discriminatory.[23]

5.2 The authors contend that the domestic courts erred, as a matter of New Zealand law, in deciding that under local law homosexual couples could not marry. The authors argue that the Courts failed to heed the injunction of its domestic law that the Marriage Act should be interpreted in accordance with the non-discrimination provision of the Bill of Rights Act 1990. The Courts did not do so despite the Government having failed objectively to justify the distinction of the Marriage Act. The authors go on to argue that the courts wrongly referred to a fixed "traditional" understanding of marriage, contending that past discrimination cannot justify ongoing discrimination and that such a view ignores evolving social constructions. As a social construct, so argue the authors, marriage can accordingly be socially deconstructed, or reconstructed. The authors find the local courts, composed of heterosexual majorities, rooted in "dominant heterosexism". They contend that society and the State have programmed their selective memories to construct marriage as inherently and naturally heterosexual, thereby clearly excluding access by "deviant others" to marriage. The authors emphasize that marriage in New Zealand is a secular act carried out according to secular rules, and others religious conceptions should not limit the rights of homosexuals.

5.3 According to the authors, their exclusion from the marriage institution fails to recognize the inherent dignity of homosexuals, to recognize their equal and inalienable rights of homosexuals as members of the human family, to provide the foundation of freedom and justice for homosexuals, to protect the human rights of homosexuals, to utilize the rule of law to protect those rights, or to demonstrate that the peoples of the United Nations have reaffirmed their faith in the dignity and worth of lesbian and gay people as human beings.

5.4 The authors also consider that homosexual couples have a legitimate expectation, derived from the Covenant's provision of equality, that the State party would actively pursue legislative measures which promote recognition of homosexual relationships by appropriate legislation. The authors go on to argue, however, that incremental improvements in the legal position of homosexual couples are not an acceptable manner in which to address past discrimination, and in any event the improvements which have taken place do not result in greater equality. The authors contend that the inclusion of homosexual couples in Property (Relationships) Act 1976 (providing equal property rights in the event of a break-up),[24] the Electricity Act 1992, the Domestic Violence Act 1995, the Harassment Act 1992, the Accident Insurance Act 1998 and the Housing Restructuring (Income-Related Rents) Amendment Act 2000 is not full recognition of homosexual couples. The authors state that a Civil Union Bill is to be proposed by the Government to Parliament, offering an alternative to marriage for legal recognition of relationships. Such a Bill would be insufficient and perpetuate inequality, however, as it would probably not offer all the legal incidents of marriage. The authors also contend that other future legislative improvements for homosexual couples that are planned in the Human Rights Amendment Bill 2001 are too few in number and generally unsatisfactory.

5.5 Finally, as to State practice, the authors point out that one State party, the Netherlands, opened civil marriage to homosexual couples with effect from 1 April 2001.

Supplementary submissions by the State party

6.1 The State party made supplementary submissions on the following matters, while rejecting the authors' comments and referring to its original submissions on the remaining issues. The State party notes, first, that its Government has not yet elected whether it will adopt the Civil Union Bill currently proposed by a Parliamentary member. Secondly, the State party states that it has continued its programmatic review of law and policy, and, through the passage of the Human Rights Amendment Act, has provided a number of improvements to the legal position of homosexual couples.[25] The Amendment Act also introduces a human rights complaint procedure (with public legal aid available) for the challenge of government policy. The tribunals established, and the courts, will be able to grant substantive remedies. In the case of a challenge to legislation, these bodies will be able to make a declaration of inconsistency requiring a government response in 120 days, while mandatory orders can issue with respect to policies and practices. In any event, the State party does not accept that a programmatic and incremental approach violates the Covenant.

6.2 As to the authors' interpretation of case law, the State party disagrees with the interpretation thereof advanced by the authors. The State party argues that, contrary to the authors' supposition, the Supreme Court of British Columbia did *not* find discrimination in the Shortt[26] case. The Court considered the infringement of the petitioners' equality rights in that case to be justified, and accordingly that there was no violation of the Canadian Charter of Rights and Freedoms. As to the unspecified case the authors refer to,[27] the State party notes that in the case of Re an Application of T.[28] the High Court determined that T's application to adopt one of her lesbian partner's three children would, on the facts, not be in the best interests of the child. No benefit would ensure to the child further to what was already provided by guardianship. In A v. R.[29] following the break-up of the same couple, the Court made a child support award in favour of the custodial parent in order properly to provide for the children. The State party rejects the contention that these cases illustrate anomalous recognition of the relationship only after it ended, arguing rather that each case was a careful assessment of the needs of the children and the effects on them of the relationship at each point.

6.3 Finally, in response to the authors' assertion that the Covenant legally creates a "legitimate expectation" that homosexual couples are recognized, the State party states that under its constitutional arrangements it is obliged to ensure, as it has done, that its domestic law is consistent with the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

7.3 As to the exhaustion of domestic remedies, the Committee notes the State party's argument that it would have been open to the Privy Council to interpret the Marriage Act, contrary to the approach of the Court of Appeal, in the manner sought by the authors. The Committee notes, however, that the State party expressly declared that it was making "no submission as to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol". In the light of this declaration and in the absence of any other objections to the admissibility of the communication, the Committee decides that the communication is admissible.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

8.2 The authors' essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry. Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Harris, D., Joseph, S.: The International Covenant on Civil and Political Rights and United Kingdom Law, Oxford, Oxford University Press, 1995, p. 507 ("It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2).")

[2] E/CN.4/1985/4, reprinted in 36 ICJ Review 47 (June 1986).

[3] The authors refer to Pantazis, A.: "An Argument for the Legal Recognition of Gay and Lesbian Marriage", (1996) 113 South African Law Journal 556; and Eskridge, W.: "A History of Same-Sex Marriage", (1993) 79 Virginia Law Review 1419.

[4] The authors refer to Bozett, F.: Gay and Lesbian Parents (1987); Schwartz-Gottman, J.: "Children of Gay and Lesbian Parents", (1989) 14 Marriage and Family Review 177; and Patterson, C.: "Children of Lesbian and Gay Parents", (1992) 63 Child Development 1025.

[5] The authors cite, in reliance, Toonen v. Australia (Communication No. 488/1992, Views adopted 31 March 1994, at 9.5) and Sutherland v. United Kingdom ((1997) 24 EHRR-CD 22, at 62).

[6] The authors refer to Aumeeruddy-Cziffra v. Mauritius (Communication No. 35/1978) and Abdulaziz et al. v. United Kingdom ((1985) 7 EHRR 471).

[7] The authors refer to Coeriel et al. v. The Netherlands (Communication No. 453/1991, Views of 31 October 1994, at 10.2).

[8] Toonen v. Australia, op. cit.

[9] Sheffield and Horsham v. United Kingdom (31-32/1997/815-816/1018-1019, Judgement of 30 July 1998), interpreting article 12 ("Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right").

[10] The State party notes that a Bill that would permit homosexual marriage is currently before the Dutch Parliament.

[11] Shorter Oxford English Dictionary, Clarendon (1993), at 1701-2 defines "marry" as "join (two persons, one *person* to another) in marriage; constitute as husband and wife according to law or custom" and "marriage" as "legally recognized personal union entered into by a man and a woman".

[12] Except for the prohibition of the infliction of capital punishment upon pregnant women under article 6, paragraph 5.

[13] Commission on Human Rights, ninth session (1953), A2929, Chap. VI, §155 & §159; Third Committee, ninth session (1954), A/5000, §1.

[14] Ghandi, S.: "Family and Child Rights", in Harris, D., Joseph, S. (eds.): The International Covenant on Civil and Political Rights and United Kingdom Law (Oxford, 1995) 491, at 507: "It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2), which speaks in terms of the right of 'men and women of marriageable age to marry and found a family'"; and Nowak, M.: United Nations Covenant on Civil and Political Rights: CCPR Commentary (Engel, Kehl, 1993) at 407: "The prohibition of '*marriages' between partners of the same sex* is easily upheld by the term 'to marry' ('se marier') which traditionally refers only to persons of different gender. Moreover, article 23 (2) places particular emphasis, as in comparable provisions in regional conventions, on the right of 'men and women' to marry" [emphasis original].

[15] Rees v. United Kingdom, 17 October 1986, Series A No. 106, p. 19, para. 49; Cossey v. United Kingdom, 27 September 1990, Series A No. 184, p. 17, para. 43; Sheffield and Horsham v. United Kingdom, 30 July 1998, Series A No. 8, p. 2030, para. 66.

[16] A/4625, para. 25, and Nowak, supra, at 283-284.

[17] Communication No. 488/1992.

[18] The State party's Government has introduced legislation into Parliament proposing uniform standards for property rights for established unmarried couples, whether homosexual or heterosexual, and married couples in the event of a relationship breakdown.

[19] These include the provision of accident compensation under the Accident Insurance Act 1998, the Domestic Violence Act 1995 and immigration to New Zealand.

[20] Hopu v. France (Communication No. 549/1993) and Aumeeruddy-Cziffra v. Mauritius (Communication No. 35/1978).

[21] Fifth session (1949), sixth session (1950), eighth session (1952), A/2929, Chap. VI, §179.

[22] Grant v. South-West Trains Ltd. (Case C-249/96, Judgement of 17 February 1998).

[23] Egale Canada Inc., Shortt et al. v. Attorney-General of Canada et al. (Unreported, 2001 BCSC 1365, 2 October 2001).

[24] The authors also refer in this connection to an unspecified case in the High Court where a court made a child support award against a non-custodial lesbian parent who had earlier had an adoption application denied. They contend that a relationship recognized after its break-up should also be recognized before.

[25] This includes provision in the Crimes Act 1961 and Judicature Act 1908 (partners of jury members), Electoral Act 1993 and Referenda (Postal Voting) Act 2000 (electoral enrolment), Holidays Act 1981 (eligibility for carers' and bereavement leave), Alcoholism and Drug Addiction Act 1966 (applications by relatives for compulsory treatment), Human Tissue Act 1964 (consent to donation of internal organs or other tissue after death), Life Insurance Act 1908 (statutory regulation of couples' insurance arrangements), Protection of Personal and Property Rights Act 1988 (protection of individuals unable to administer their own affairs), Sale of Liquor Act 1989 (administration of licensed premises), Summary Proceedings Act 1957 (service of court documents) and War Pensions Act 1954 (pension eligibility).

[26] Op. cit.

[27] Supra, note 23.

[28] [1998] NZFLR 769.

[29] (1999) 17 FRNZ 647.

APPENDIX

Individual opinion of Committee members Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring)

We found no difficulty in joining the Committee's consensus on the interpretation of the right to marry under article 23, paragraph 2. This provision entails an obligation for States to recognize as marriage the union of one adult man and one adult woman who wish to marry each other. The provision in no way limits the liberty of States, pursuant to article 5, paragraph 2, to recognize, in the form of marriage or in some other comparable form, the companionship between two men or between two women. However, no support can be drawn from this provision for practices that violate the human rights or dignity of individuals, such as child marriages or forced marriages.

As to the Committee's unanimous view that it cannot find a violation of article 26, either, in the non-recognition as marriage of the same-sex relationships between the authors, we wish to add a few observations. This conclusion should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.

Contrary to what was asserted by the State party (para. 4.12), it is the established view of the Committee that the prohibition against discrimination on grounds of "sex" in article 26 comprises also discrimination based on sexual orientation.[1] And when the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences.[2] No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria.

However, in the current case we find that the authors failed, perhaps intentionally, to demonstrate that they were personally affected in relation to certain rights not necessarily related to the institution of marriage, by any such distinction between married and unmarried persons that would amount to discrimination under article 26. Their references to differences in treatment between married couples and same-sex unions were either repetitious of the refusal of the State party to recognize same-sex unions in the specific form of "marriage" (para. 3.1), an issue decided by the Committee under article 23, or remained unsubstantiated as to if and how the authors were so personally affected (para. 3.5). Taking into account the assertion by the

State party that it does recognize the authors, with and without their children, as families (para. 4.8), we are confident in joining the Committee's consensus that there was no violation of article 26.

(Signed) Rajsoomer Lallah

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Toonen v. Australia, Communication No. 488/1992.

[2] Danning v. The Netherlands, Communication No. 180/1984.

AA. Communication No. 906/2000, Chira Vargas v. Peru (Views adopted on 22 July 2002, seventy-fifth session)*

Submitted by:	Mr. Félix Enrique Chira Vargas-Machuca
Alleged victim:	The author
State party:	Peru
Date of communication:	15 September 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2002,

Having concluded its consideration of Communication No. 906/2000 submitted to the Human Rights Committee by Mr. Félix Enrique Chira Vargas-Machuca under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author, the communication and the State party,

Adopts the following:

View under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Félix Enrique Chira Vargas-Machuca, a Peruvian citizen who claims to be a victim of violations by Peru of articles 14 and 17 of the International Covenant on Civil and Political Rights. Although this is not explicitly stated by the author, the communication could also raise issues under article 25 (c) and article 2, paragraph 3, of the Covenant. The author is represented by counsel.

The facts as submitted by the author

2.1 The author was a commander in the Peruvian National Police and Chief of the Police Drug Squad in the town of Trujillo. On 2 October 1991, Mr. Áureo Pérez Arévalo, who had been arrested for international drug trafficking, died at the San Andrés police station. According to the author, the deceased was in the custody and charge of officials of the Preventive Police and not of the headquarters of the Drug Investigation Department.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.2 The author states that, following the death of Mr. Pérez Arévalo, he made the requisite report to the Office of the Criminal Procurator and the magistrate of the Second Court of Investigation, who immediately accepted jurisdiction over the case. However, in a report dated 15 October 1991, the Office of the National Police Headquarters Legal Adviser maintained that the investigating magistrate in Trujillo had not accepted jurisdiction over the case, since the duty provincial procurator had not made the requisite report on the case and, furthermore, he had been apprised of the matter only as a preventive measure and not with a view to instituting judicial proceedings.

2.3 On 16 October 1991, an administrative decision relieved the author of his duties as a disciplinary measure, after 26 years of service.[1] The decision was based on a report dated 8 October 1991, which contained conclusions based on a police report that the author claims never existed, and a second disciplinary report dated 16 October 1991, in which the author was accused of violating article 84.C.6 of the Disciplinary Regulations, although he contends that the article in question was intended to cover a different situation.

2.4 The same day, an order was issued for the author's arrest, without a judicial order and without his being apprehended in flagrante delicto. The author was taken to Lima, where he was forced to attend a press conference. The author claims that no charges were ever brought against him, in either the ordinary or the military courts, for criminal negligence or liability in the course of his duties, or for any other criminal offence arising from the death of Mr. Pérez Arévalo, and that he was neither tried nor sentenced.

2.5 On 25 October 1991, the Office of the National Police Headquarters Legal Adviser issued a report stating that the author, in his capacity as Chief of the Drug Department, had failed to inform his superiors of the action he had taken against Mr. Pérez Arévalo for illicit drug trafficking. The author, however, maintains that the Institutional Command was informed immediately and expediently of the detention of certain individuals for drug trafficking, in the report of the Trujillo Police Department secretariat dated 1 October 1991. The Ministry of the Interior was also informed of the arrest of Mr. Pérez Arévalo and others, in a letter dated 4 October 1991 from the National Police Directorate-General.

2.6 According to the author, the minutes of the National Police Board of Inquiry dated 16 October 1991, which was based on the disciplinary reports dated 8 and 16 October 1991 and the reports prepared by the Office of the National Police Headquarters Legal Adviser, contained a number of irregularities, such as erasures of time and date, which constituted violations of the rules of procedure of the Board of Inquiry. In addition, the author was not notified in advance of the Board of Inquiry hearing.[2] He was under arrest at the time and found it difficult to prepare a defence: he was allowed only two minutes to present his case and had no time to submit any evidence in his own defence.

2.7 On 30 January 1995, the author submitted an application for amparo to the Trujillo Third Special Civil Court, requesting that the Supreme Decision relieving him of his duties should be declared unenforceable. In its judgement of 2 March 1995, the Court declared the decision unenforceable and ordered the reinstatement of the author to active service in the National Police with the rank of commander. The judgement was appealed by the Public Prosecutor of the Ministry of the Interior in the Trujillo First Civil Division which, on 20 June 1995, upheld the order for the author's reinstatement. The Public Prosecutor then appealed to the Constitutional Division of the Supreme Court, which, in its decision of 6 December 1995, declared itself incompetent to hear the appeal. On 27 December 1995, the appeal was declared inadmissible by the Trujillo First Civil Division.

2.8 On 12 January 1996, the Trujillo Third Special Civil Court ordered the execution of the judgement of 2 March 1995, with the reinstatement of the author as commander in the police force. In a written submission dated 1 February 1996, the Public Prosecutor opposed the author's reinstatement, arguing that administrative procedures must be carried out prior to such reinstatement.

2.9 On 15 February 1996, the author requested the Trujillo Third Special Civil Court to urge the Ministry of the Interior to implement the Supreme Decision ordering his reinstatement and to publish it in the Official Gazette. On 23 May 1996, the Court issued a decision giving the Ministry of the Interior 10 days to implement and publish the Supreme Decision. However, on 28 May 1996, the National Police Public Prosecutor declared the decision null and void, claiming that the relevant procedures had not been completed and that the decision should be signed by the President of the Republic.

2.10 The author sent notarized communications to the Ministry of the Interior and to the President of the Republic on 8 and 12 August 1996 respectively, informing them that the judicial order had not been executed. The Trujillo Third Special Civil Court sent a note dated 9 April 1997 to the Secretary of the Office of the President of Peru requesting information on the outcome of the draft Supreme Decision that the Minister of the Interior had transmitted to the President on 15 February 1996. On 25 June 1997, the Court again requested the President to sign the decision, to no avail.

The complaint

3.1 The author states that the events described constitute a violation of the provisions of article 14, paragraphs 1 and 2, of the Covenant, relating to presumption of innocence and the right to a defence, insofar as he was punished and relieved of his duties without being brought before a competent court. He also draws attention to irregularities in administrative procedures.

3.2 The author maintains that article 17 of the Covenant was violated insofar as the accusation made against him affected his reputation, honour and image in his performance of his duties as a police officer. In particular, he contends that the holding of the press conference jeopardized his future promotion to colonel.

Observations by the State party

4.1 The State party submitted its observations on admissibility on 22 March 2000 and on the merits on 27 July 2000.

4.2 The State party challenges the admissibility of the communication, arguing that, in compliance with the judgement in which the decision relieving the author of his duties was declared unenforceable, the Ministry of the Interior took the necessary steps to resolve the case and, in its Supreme Decision of 21 August 1997, ordered the author's reinstatement to active service as a commander in the Peruvian National Police. Consequently, the State party claims that there is no longer any victim since the case has been resolved.

4.3 Furthermore, the State party considers that the communication should be declared inadmissible inasmuch as it constitutes an abuse of process, having been submitted one month after publication of the Supreme Decision reinstating the author in his post.

4.4 In its observations on the merits, the State party confines itself to a repetition of the arguments used in its observations on admissibility, and requests the Committee to declare the communication inadmissible.

Comments by the author

5.1 The author submitted his comments on the State party's observations on admissibility on 2 December 2000 and on the State party's observations on the merits on 23 January and 15 August 2001.

5.2 The author responds to the State party's arguments with regard to admissibility and points out that, on 15 February 1996, he brought constitutional enforcement proceedings before the Trujillo Third Special Civil Court, which ruled in his favour. The Civil Court's decision was subsequently transmitted to the Constitutional Court. On 2 February 1998, the Prosecutor of the Ministry of the Interior transmitted the Supreme Decision of 21 August 1997 concerning the author's reinstatement in his duties, to the Constitutional Court. However, the Prosecutor failed to mention a subsequent decision, issued on 29 August 1997, which arbitrarily forced the author to retire owing to the reorganization of the police force. The author claims, therefore, that the whole exercise was a sham since, from 16 October 1991, the date on which he was relieved of his duties, until 2 December 2000,[3] and he has not been reinstated to active service.

5.3 The author responds to the State party's observations on the merits, arguing that the supreme decisions regarding his retirement owing to the reorganization of the police force, issued by the Government of Alberto Fujimori, were not in keeping with due process because no reasons were given. The author claims that the decision of 29 August 1997 was irregular because no reason was given and his retirement was therefore arbitrary.

Issues and proceedings before the Committee

6.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party challenges the admissibility of the communication on the grounds that the author's reinstatement to active service was stipulated in Supreme Decision of 21 August 1997 and that the case was thereby resolved. Nevertheless, the Committee notes the author's statements claiming that he was not reinstated. In the circumstances of the present case, the Committee declares the communication admissible, particularly as regards article 25 of the Covenant, and turns now to the merits.

Consideration as to the merits

7.1 The Committee has considered the present communication in the light of all the information submitted by the parties in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the State party did not provide any information concerning the merits of the author's complaints. In the absence of a reply from the State party, due consideration should be given to the author's complaints, to the extent that they are substantiated.

7.3 With regard to the alleged violations of article 14, paragraphs 1 and 2, of the Covenant, the author alleges a violation of his right to the presumption of innocence and his right to a defence inasmuch as he was relieved of his duties without having been brought before a competent court. The Committee recalls that article 14, paragraph 1, guarantees everyone the right, in the determination of his rights and obligations, to a hearing by an impartial tribunal or court, including the right of access to a civil court. In that regard, the Committee notes that both the Trujillo Third Special Civil Court and the Trujillo First Civil Division found that the author had been unlawfully dismissed and reinstated him in his post. Consequently, the Committee considers that, in this case, there was no violation of due process within the meaning of article 14, paragraph 1, of the Covenant. The Committee also considers that the domestic courts recognized the author's innocence and that consequently there was no violation of the right contained in article 14, paragraph 2, of the Covenant and, for the same reason, there was no violation of article 17 of the Covenant.

7.4 Although not explicitly stated by the author, the Committee considers that the communication raises issues under article 25 (c) concerning every citizen's right to have access, on general terms of equality, to public service in his country, together with the right to the execution of decisions and judgements. In this regard, the Committee notes the author's claims that, notwithstanding the Supreme Decision of 21 August 1997, he was never reinstated in his post, and that another Supreme Decision was issued on 29 August 1997 forcing him to retire owing to the reorganization of the police force. Considering that the State party has not demonstrated in what way it reinstated the author in service, what rank he was given or on what date he resumed his post, as required by law in the light of the annulment ruling of 2 March 1995, the Committee considers that there has been a violation of article 25 (c), in conjunction with article 2, paragraph 3, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts that have been set forth constitute violations of article 25 (c) of the Covenant, in conjunction with article 2, paragraph 3, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to his duties and to his post, with all the consequences that that implies, at the rank that he would have held had he not been dismissed in 1991, or to a similar post;[4] (b) compensation comprising a sum equivalent to the payment of the arrears of salary and remuneration that he would have received from the time at which he was not reinstated to his post.[5] Finally, the State party must ensure that similar violations do not recur in the future.

10. Bearing in mind that, in acceding to the Optional Protocol, the State party has recognized the Committee's competence to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and applicable remedy in the event that violation has been found, the Committee wishes to receive information from the State party within 90 days on the measures it has adopted to give effect to the Committee's Views. It also requests the State party to publish the Committee's Views.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] According to the decision, the author had committed serious breaches of discipline and police regulations through his improper handling of a drug trafficking case, which resulted in the death of the suspect, Áureo Pérez Arévalo.

[2] The author does not mention the date of the hearing in the communication.

[3] Date on which the author submitted his comments on admissibility.

[4] See the Committee's Views concerning Communication No. 630/1995, Abdoulaye Mazou v. Cameroon, paragraph 9, and Communication No. 641/1995, Gedumbe v. Democratic Republic of the Congo.

[5] See the Views concerning Communications No. 422/1990, No. 423/1990 and No. 424/1990, Adimado M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo, paragraph 9.

BB. Communication No. 916/2000, Jayawardena v. Sri Lanka (Views adopted on 22 July 2002, seventy-fifth session)*

Submitted by:	Mr. Jayalath Jayawardena
Alleged victim:	The author
State party:	Sri Lanka
Date of communication:	23 February 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2002,

Having concluded its consideration of Communication No. 916/2000, submitted to the Human Rights Committee by Mr. Jayalath Jayawardena under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, is Mr. Jayalath Jayawardena, a Sri Lankan citizen, residing in Colombo, Sri Lanka. He claims to be a victim of violations by Sri Lanka of the International Covenant on Civil and Political Rights. The author does not invoke any specific provision of the Covenant, however, the communication appears to raise issues under article 9, paragraph 1, of the Covenant. He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of a partially dissenting opinion co-signed by Committee members Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, and Mr. Maxwell Yalden is appended to the present document.

The facts as submitted by the author

2.1 The author is a medical doctor and a member of the United National Party ("UNP") in Sri Lanka. At the time of his initial communication, he was an opposition Member of Parliament but in December 2001 his party obtained a majority in Parliament and he was appointed Minister of Rehabilitation, Resettlement and Refugees. From 1998, Mrs. Chandrika Bandaranaike Kumaratunga, the President of Sri Lanka, made public accusations, during interviews with the media, that the author was involved with the Liberation Tigers of Tamil Elam ("LTTE") and such allegations were given wide publicity by the "government-controlled" radio and television corporations. In addition, the same allegations appeared on the Daily News newspaper on 9 and 10 September 1998, and 5 January 2000, respectively.

2.2 On 3 January 2000, and during an interview broadcast over the State-owned television station, the President again accused the author of involvement with the LTTE. Two days later, a lawyer and leader of the All Ceylon Tamil Congress, who openly supported the LTTE, was assassinated by an unidentified gunman in Colombo. The author feared that he too would be murdered and that the President's accusations exposed him to many death threats by unidentified callers and to being followed by unidentified persons.

2.3 On 2 March 2000, the Secretary-General of Parliament requested the Ministry of Defence to provide the author with the same security afforded to the Members of Parliament in the North-East of the country, as his work was concentrated in those provinces. He also stated that the author was in receipt of certain threats to his life and requested that he receive additional personal security. The Secretary-General of Parliament confirmed in two letters to the author that he did not receive a response from the Ministry of Defence to his request. On 13 March 2000, the President accused the UNP of complicity with the LTTE in an interview published by the Far Eastern Economic Review.

2.4 On or around 15 March 2000, the author received two extra security guards, however they were not provided with "emergency communication sets" and the author was not provided with dark tinted glass in his vehicle. Such security devices are made available to all government Members of Parliament whose security is threatened, as well as providing them with more than eight security guards.

2.5 In several faxes submitted by the author, he provides the following supplementary information. On 8 June 2001, a State-owned newspaper published an article in which it stated that the author's name had appeared in a magazine as an LTTE spy. After this incident, the author alleges to have received around 100 death threats over the telephone and was followed by several unidentified persons in unmarked vehicles. As a result of these calls, the author's family was in a state of "severe psychological shock". On 13 June 2001, the author made a complaint to the police and requested extra security, but this was not granted.

2.6 On 18 June 2001, the author made a statement to Parliament revealing the fact that his life and that of his family were in danger. He also requested the Speaker of the Parliament to refer his complaint to the "privileges committee".[1] Pursuant to his complaint to the Speaker a "select committee"[2] was set up to look into his complaint, however because of the "undemocratic prorogation to the parliament", this matter was not considered.[3]

2.7 In addition, the author made a complaint to the police against a Deputy Minister of the Government who threatened to kill him. On 3 April 2001, the Attorney-General instructed the "Director of Crimes of Police" to prosecute this Minister. However, on 21 June 2001, the Attorney-General informed the Director of Crimes that he (the Attorney-General) would have to re-examine this case again following representations made by the Deputy Minister's lawyer. The author believes that this is due to political pressure. On 19 June 2001, the author wrote to the Speaker of Parliament requesting him to advise the Secretary of the Ministry of Defence to provide him with additional security as previously requested by the Secretary-General of Parliament.

2.8 On the following dates the President and the State-owned media made allegations about the author's involvement with the LTTE: 25 June 2001; 29 July 2001; 5 August 2001; 7 August 2001; and 12 August 2001. These allegations are said to have further endangered the author's life.

2.9 Furthermore, on 18 July 2001, the author alleges to have been followed by an unidentified gunman close to his constituency office. The author lodged a complaint with the police on the same day but no action was taken in this regard. On 31 August 2001, a live hand grenade was found at a junction near his residence.[4] During the parliamentary election campaign which ended on 5 December 2001, the author alleges that the President made similar remarks about the connection between the UNP and the LTTE.

The complaint

3.1 The author complains that allegations made by the President of Sri Lanka on the State-owned media, about his alleged involvement with the LTTE, put his life at risk. He claims that such allegations are tantamount to harassment and resulted from his efforts to draw attention to human rights issues in Sri Lanka. He claims that he has no opportunity to sue the President as she is immune from suit.

3.2 The author claims that the State party did not protect his life by refusing to grant him sufficient security despite the fact that he was receiving death threats.

3.3 The author further claims that the State party failed to investigate any of the complaints he made to the police on the issue of the death threats received against him.

State party's submission on the admissibility and merits of the communication

4.1 By letter of 6 September 2000, the State party made its submission on the admissibility of the communication and by letter of 3 July 2001, its submission on the merits. According to the State party, the author has not availed himself of any domestic remedies as required under article 2 of the Optional Protocol. It states that if the author believed that the President's allegations infringed his civil and political rights, there are domestic remedies available to him under the Constitution and the Penal Code of Sri Lanka, against the media, restraining it from publishing or broadcasting such information, or instituting proceedings against it. It also submits that, apart from the author's statement that the President is immune from suit, he has not claimed that he has no faith in the judicial system in Sri Lanka for the purposes of pursuing his rights and claiming relief in respect of the publication or broadcasting of the material.

4.2 The State party contests that the author has been receiving death threats from unidentified callers and has been followed by unidentified persons, as there is no mention of him making such complaints to the domestic authorities. In this context, it also states that the author's failure to report such threats is an important factor in assessing his credibility.

4.3 On the merits, the State party submits that as a Member of Parliament and a medical practitioner, the author led a very open life, participating in television programmes relating both to the political as well as the medical field. He actively took part in political debates both in the television and the print media, without any indication of restraint, which would normally have been shown by a person whose life is alleged to be "under serious threat". In this regard, the State party submits that in response to the allegations made by the President, the author issued a denial, which was given an equivalent amount of television, radio and press coverage in both the government and private sectors.

4.4 The State party also submits that the fact that the author made no complaint to the domestic authorities about receiving death threats and did not pursue available legal remedies against the media restraining them from publication of material considered to be prejudicial to him, indicates that the author is engaged in a political exercise in international forums, to bring discredit to the Government of Sri Lanka rather than vindicating any human right which has been violated. According to the State party, the fact that the author failed to refer to the violation of any particular right under the Covenant would also confirm the above hypothesis.

4.5 Furthermore, it is submitted that there is no link between the assassination of the leader of the All Ceylon Tamil Congress, who was a lawyer, and the President's allegations about the author. It states that the President did not refer to the leader of this party in the interview in question and states that he had been openly supporting the LTTE for a long period of time. According to the State party, there are many lawyers who appear for LTTE suspects in Sri Lankan courts but who have never been subjected to any form of harassment or threat, and there have been no complaints of such a nature to the authorities.

4.6 Finally, the State party submits that the President of Sri Lanka, as a citizen of this country, is entitled to express her views on matters of political importance, as any other person exercising the fundamental rights of freedom of expression and opinion.

Comments by the author

5.1 On the issue of admissibility, the author submits that his complaint does not relate to the Sri Lankan press nor the Sri Lankan police but to the President's allegations about his involvement with the LTTE. He submits that the President herself should be accountable for the statements made against him by her. However, as the President has legal immunity no domestic remedy exists that can be exhausted. The author quotes from the Sri Lankan Constitution,

- 30-(1) "There shall be a President of the Republic of Sri Lanka who is the head of the State, the head of the executive and of the Government and the Commander-in-Chief of the Armed Forces.

- 35-(1) While any person holds office as President no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity."

5.2 With respect to the State party's submission that the author made no official complaint about the death threats and necessity for increased security, the author reiterates what attempts he made in this regard, stating that he made many complaints to the police and submits a copy of one such complaint, dated 11 January 2000.

5.3 The author adds that on 18 July 2001 the Speaker of the Parliament requested the Secretary of the Ministry of Defence to provide the author with increased security. Similarly, on 23 July 2001, the leader of the opposition also wrote to the Secretary with the same request.[5] In a letter, dated 27 July 2001, the Secretary informed the Leader of the Opposition that both of these letters were forwarded to the President for consideration. The author states that he does not expect to receive such increased security as the President is also the Commander-in-Chief of the Police and Armed Forces.

5.4 The author refers to observations by international organizations on this issue who referred to the allegations made by the President and requested her to take steps to protect the author's life, including the investigation of threats to his life. According to the author, the President did not respond to these requests.

5.5 Finally, the author states that, the President did openly and publicly label the leader of the All Ceylon Tamil Congress a supporter of the LTTE but in any event he does not intend the Committee to investigate the circumstances of his death.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee notes the author's claim that his rights were violated, as he received death threats following allegations made by the President on his involvement with the LTTE, and his claim that he has no remedy against the President herself, as she is immune from suit. The State party insists that the author could have taken a legal action against the media which broadcast or published the President's allegations. While the State party does not contest that, due to her immunity, the President could not have been the subject of a legal action, it does not indicate whether the author had any effective remedies to obtain reparation for the eventual harm to his personnel security which the President's allegations may have caused. For these reasons the Committee finds that the author has exhausted domestic remedies, and this part of the communication is admissible. The Committee notes that this claim may raise issues under article 9, paragraph 1, of the Covenant.

6.4 In relation to the issue of the State party's failure to investigate his claims of death threats, the Committee notes the State party's argument that the author did not exhaust domestic remedies as he failed to report these complaints to the appropriate domestic authorities. From the information provided, the Committee observes that the author made at least two complaints to the police. For this reason, and because the State party has not explained what other measures the author could have taken to seek domestic redress, the Committee is of the view that the author has exhausted domestic remedies in this regard. The Committee notes that this claim may raise issues under article 9, paragraph 1, of the Covenant. The Committee finds no other reason to question the admissibility of this aspect of the communication.

6.5 In relation to the issue of the State party's failure to protect the author by granting him increased security the Committee notes the author's argument that the level of security afforded to him was inadequate and not at the level afforded to other Members of Parliament, in particular to Members of Parliament working in the North-East of the country. The Committee notes, that although the State party did not specifically respond on this issue, the author does affirm that he received "two extra security guards" but provides no further elaboration on the exact level of security afforded to him as against other Members of Parliament. The Committee, therefore, finds that the author has failed to substantiate this claim for the purposes of admissibility.

6.6 The Committee therefore decides that the parts of the communication which relate to the claim in respect of the President's allegations against the author, and the State party's failure to investigate the death threats against the author are admissible.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 In respect of the author's claim that the allegations made publicly by the President of Sri Lanka put his life at risk, the Committee notes that the State party has not contested the fact that these statements were in fact made. It does contest that the author was the recipient of death threats subsequent to the President's allegations but, on the basis of the detailed information provided by the author, the Committee is of the view that due weight must be given to the author's allegations that such threats were received after the statements and the author feared for his life. For these reasons, and because the statements in question were made by the Head of State acting under immunity enacted by the State party, the Committee takes the view that the State party is responsible for a violation of the author's right to security of person under article 9, paragraph 1, of the Covenant.

7.3 With regard to the author's claim that the State party violated his rights under the Covenant by failing to investigate the complaints made by the author to the police in respect of death threats he had received, the Committee notes the State party's contention that the author did not receive any death threats and that no complaints or reports of such threats were received. However, the State party has not provided any specific arguments or materials to refute the author's detailed account of at least two complaints made by him to the police. In the circumstances, the Committee concludes that the failure of the State party to investigate these threats to the life of the author violated his right to security of person under article 9, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Sri Lanka of article 9, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights

recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] No further information is provided on this committee.

[2] No further information is provided on this committee.

[3] No further information has been provided by the author on this matter.

[4] According to a newspaper article, provided by the author on this matter, an investigation was carried out and the officer-in-charge stated that the incident had nothing to do with the author.

[5] The author draws the Committee's attention to the following paragraph of this letter, "Mr. Jayawardena has made several complaints to the local police and the IGP himself all of which have been to no avail. So much so that as recently as the 18th of July 2001 an unidentified gunman was found loitering outside his home. It is regrettable to note that in spite of all this no action has been taken by your Ministry to accede to the request of the Speaker."

APPENDIX

Individual opinion, partially dissenting, of Committee members Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah and Mr. Maxwell Yalden

We share the Committee's view regarding the State party's failure to investigate the death threats against the author.

We disagree, however, on the Committee's decision that the author's claim of a violation of his right under article 9, paragraph 1, of the Covenant by the allegations by the President through the State-owned media against him (see above paragraph 3.1), is admissible under the Optional Protocol. In our view the author has not exhausted domestic remedies.

As stated above, the author's allegations related to the allegations by the President through the State-owned media, but the author has not explained why he failed to take legal action against the media or to go to the courts to stop any of those allegations made against him. The fact that the President as Head of State enjoys personal immunity from suit does not mean that there was no procedure of redress against other State or State-controlled organs. Therefore, in our view, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol and should not have been dealt with in the merits.

(Signed) Nisuke Ando

(Signed) Prafullachandra Bhagwati

(Signed) Eckart Klein

(Signed) David Kretzmer

(Signed) Rajsoomer Lallah

(Signed) Maxwell Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

CC. Communication No. 919/2000, Müller and Engelhard v. Namibia (Views adopted on 26 March 2002, seventy-fourth session)*

Submitted by:	Mr. Michael Andreas Müller and Imke Engelhard, (represented by counsel Mr. Light Clinton)
Alleged victims:	The authors
State party:	Namibia
Date of communication:	29 October 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2002,

Having concluded its consideration of Communication No. 919/2000, submitted to the Human Rights Committee by Mr. Michael Andreas Müller and Imke Engelhard, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 8 November 1999, are Mr. Michael Andreas Müller (hereinafter called Mr. Müller), a German citizen, born on 7 July 1962, and Imke Engelhard (hereinafter called Ms. Engelhard), a Namibian citizen, born on 16 March 1965, who claim to be victims of a violation by Namibia[1] of articles 26, 23 paragraph 4, and 17, paragraph 1, of the International Covenant on Civil and Political Rights (the Covenant). They are represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 Mr. Müller, a jewellery maker, came to Namibia in July 1995 as a visitor, but was so taken up with the country that he decided to settle in the city of Swakopmund. He started to work for Engelhard Design, a jewellery manufacturer since 1993, owned by Ms. Engelhard. The authors married on 25 October 1996. Before getting married, they sought legal advice concerning the possibility of adopting Ms. Engelhard's surname. A legal practitioner informed them that this was possible. After the marriage, they returned to the same legal practitioner to complete the formalities to change the surname. They were then informed that whereas a wife could assume her husband's surname without any formalities, a husband would have to apply to change his surname.

2.2 The Aliens Act No. 1 of 1937 (hereinafter named the Aliens Act) section 9, paragraph 1 as amended by Proclamation A.G. No. 15 of 1989, states that it is an offence to assume another surname than a person has assumed, described himself, or passed before 1937, without the authorization by the Administrator General or an officer in the Government Service, and such authority has been published in the Official Gazette, or unless one of the listed exceptions apply. The listed exception in the Aliens Act section 9, paragraph 1 (a), is when a woman on her marriage assumes the surname of her husband. Mr. Müller submits that the said section infringes his rights under the Namibian Constitution to equality before the law and freedom from discrimination on the grounds of sex (art. 10), his and his family's right to privacy (art. 13, para. 1), his right to equality as to marriage and during the marriage (art. 14, para. 1), and his right to have adequate protection of his family life by the State party (art. 14, para. 3).

2.3 Mr. Müller further submits that there are numerous reasons for his wife's and his own desire that he assumes the surname of Ms. Engelhard. He contends that his surname, Müller, is extremely common in Germany, and exemplifies this by explaining that the phonebook in Munich were he comes from, contained several pages of the surname Müller, and that there were 11 Michael Müller alone in the phonebook for Munich. He contends that Engelhard is a far more unusual surname, and that the name is important to his wife and him because their business has established a reputation under the name Engelhard Design. It would be unwise to change the name to Müller Design because the surname is not distinctive. It is likewise important that jewellery manufacturers trade under a surname because the use of one's surname implies that one takes pride in one's work, and customers believe that it ensures a higher quality of workmanship. Mr. Müller submits that if he were to continue to use his surname, and his wife were to continue to use hers, customers and suppliers would assume that he was an employee. Mr. Müller and his wife also have a daughter who has been registered under the surname of Engelhard, and Mr. Müller would like to have the same surname as his daughter to avoid exposing her to unkind remarks about him not being the father.

2.4 Mr. Müller filed a complaint to the High Court of Namibia on 10 July 1997, alleging that section 9, paragraph 1 of the Aliens Act was invalid because it conflicted with the Constitution with regard to the right to equality before the law and freedom from discrimination, the right to privacy, the right to equality as to marriage and during the marriage, and with regard to the right to family life.

2.5 Ms. Engelhard filed an affidavit with her husband's complaint, in which she stated that she supported the complaint and that she also wanted the joint family surname to be Engelhard rather than Müller, for the reasons given by her husband. The case was dismissed with costs on 15 May 1998.

2.6 Mr. Müller's appeal to the Supreme Court of Namibia was dismissed with costs on 21 May 1999. The Supreme Court being the highest court of appeal in Namibia, the authors submit that they have exhausted domestic remedies.

The complaint

3.1 Mr. Müller claims that he is the victim of a violation of article 26 of the Covenant, as the Aliens Act section 9, paragraph 1 (a) prevents Mr. Müller from assuming his wife's surname without following a described procedure of application to a government service, whereas women wanting to assume their husbands' surname may do so without following this procedure. Likewise, Ms. Engelhard claims that her surname may not be used as the family surname without complying with these same procedures, in violation of article 26. They submit that this section of the law clearly differentiates in a discriminatory way between men and women, in that women automatically may assume the surnames of their husbands on marriage, whereas men have to go through specified procedures of application. The procedure for a man wanting to assume his wife's surname requires that:

(i) He must publish, in two consecutive editions of the Official Gazette and two daily newspapers in a prescribed form, an advertisement of his intention and reasons to change his surname, and he must pay for these advertisements;

(ii) He must submit a statement to the Administrator-General or an officer in the Government Service authorized thereto by him;

(iii) The Commissioner of Police and the magistrate of the district must furnish reports about the author;

(iv) Any objection to the person assuming another surname must be attached to the magistrate's report;

(v) The Administrator-General or an officer in the Government Service authorized thereto by him, must on the basis of these statements and reports be satisfied that the author is of good character and that there is sufficient reason for his assumption of another surname;

(vi) The applicant must pay prescribed fees and comply with such further requirements as may be prescribed by regulation.

3.2 The authors refer to a similar case of discrimination of the European Court of Human Rights, Burghartz v. Switzerland.[2] In that case, the European Court held that the objective of a joint surname reflecting the family unity, could be reached just as effectively by adopting the surname of the wife as the family surname, and allowing the husband to add his surname, as by the converse arrangement. The Court, before finding a violation of articles 14 and 8 of the European Convention on Human Rights, also stated that there was no genuine tradition at issue, but that in any event the Convention must always be interpreted in the light of present day conditions, particularly regarding the importance of the principle of non-discrimination. The authors further refer to the Committee's General Comment No. 18,[3] where the Committee explicitly stated that any distinction based on sex is within the meaning of discrimination in article 26 of the Covenant, and that the prohibited discrimination includes that the content of a law should not be discriminatory. The authors submit, that by applying the Committee's interpretation of article 26 of the Covenant, as stated in General Comment No. 18, Aliens Act section 9, paragraph 1 (a) discriminates against both men and women.

3.3 The authors claim that they are victims of a violation of article 23, paragraph 4 of the Covenant, as section 9, paragraph 1 of the Aliens Act infringes their right to equality as to marriage and during their marriage, by allowing a wife's surname to be used as the common family name only if specified formalities are applied, whereas a husband's surname may be used without applying these formalities. The authors refer to the Committee's General Comment No. 19,[4] where the Committee notes in respect of article 23, paragraph 4 of the Covenant, that the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of the family name, should be safeguarded.

3.4 The authors refer to the jurisprudence of the Committee in the case Coeriel et al v. The Netherlands,[5] and allege a violation of article 17, paragraph 1, in that a person's surname constitutes an important component of one's identity and that the protection against arbitrary and unlawful interference with one's privacy includes the protection of the right to choose and change one's surname.

3.5 With regard to a remedy, the authors seek the following:

(a) A statement that the authors' rights under the Covenant have been violated;

(b) That Aliens Act section 9, paragraph 1 (a) is in violation of, in particular, articles 26, 23, paragraph 4, and 17, paragraph 1 of the Covenant;

(c) That Namibia should immediately allow Mr. Müller to assume Ms. Engelhard's surname without complying with the provisions of the Aliens Act;

(d) That the respondents in the High Court of Namibia and in the Supreme Court of Namibia should not recover costs awarded in their favour in these courts;

(e) And that Namibia should amend the Aliens Act section 9, paragraph 1, to comply with its obligations under the Covenant.

The State party's observations on the admissibility and the merits of the communication

4.1 By submission of 5 June 2000, the State party made its observations on the admissibility of the communication and by submission of 17 October 2000, it made its observations on the admissibility and the merits.

On admissibility

4.2 With regard to Mr. Müller, the State party confirms that he has exhausted domestic remedies in that his claim was brought to the High Court of Namibia and appealed to the Supreme Court of Namibia. However, the State party points out that the author brought his claim directly to the courts, without complying with the terms of the Aliens Act. The State party further contends that the Committee has neither the power nor the authority to consider the author's claim of a specific remedy as in paragraph 3.5 (d) above, since the author in the national proceedings did not claim that the Supreme Court was incompetent to award costs, nor did he contend that Namibian laws on the award of costs by the national courts violated the Namibian Constitution or Namibia's obligations under the Covenant.

4.3 With regard to Ms. Engelhard, the State party submits that she has not exhausted domestic remedies and has not provided any explanation for not doing so. It is therefore contended that Ms. Engelhard's communication is not admissible under article 5 (2) (b) of the Optional Protocol, and the State party's response to the merits does not relate to her claims.

On the merits

4.4 With regards to the author's claim of a violation of article 26 of the Covenant, the State party submits that it does not dispute that Aliens Act section 9, paragraph 1, differentiates between men and women. However, it is submitted that the differentiation is reasonably justified by its object to fulfil important social, economic and legal functions. Surnames are used to ascertain an individual's identity for such purposes as social security, insurance, licenses, marriage, inheritance, voting, and being voted for, passports, tax, and public records, and constitutes therefore an important component of one's identity, see Coeriel et al v. The Netherlands. Aliens Act, section 9 gives effect to a long-standing tradition in the Namibian community that the wife normally assumes the surname of her husband, and no other husband has expressed a wish to assume his wife's surname since the Aliens Act entered into force in 1937. The purpose of differentiation created by the Aliens Act was to achieve legal security and certainty of identity, and are thereby based upon reasonable and objective criteria.

4.5 It is further submitted that section 9, paragraph 1 of the Aliens Act does not restrict Mr. Müller from assuming his wife's name, but provides a simple and uncomplicated procedure, which would enable the author to fulfil his wish. The present case distinguishes from Burghartz v. Switzerland by that the author in that case had no remedy to assume his surname in a hyphenated form to his wife's surname.

4.6 The State party contends that article 26 of the Covenant is characterized by an element of unjust, unfair and unreasonable treatment, which is not applicable to the author's case, nor has it been contended that the purpose of Aliens Act section 9, paragraph 1 was to impair males in Namibia individually or as a group.

4.7 In response to the author's claim under article 23, paragraph 4 of the Covenant, the State party contends that in accordance with this article, and the Committee's interpretation in General Comment 19, Namibian law permits the author to participate on equal basis with his spouse in choosing a new name, although he must proceed in accordance with laid down procedures.

4.8 Regarding Mr. Müller's claim under article 17, paragraph 1 of the Covenant, the State party contends that this right only protects the author from arbitrary, meaning unreasonable and purposelessly irrational, or unlawful interference with his privacy. Viewing the purpose of Aliens Act section 9, paragraph 1 as described above, inasmuch the author may change his surname if he so wishes, the law is not unreasonable, and does not violate the State party's obligations under article 17, paragraph 1.

4.9 The State party contests the remedies sought by the author.

Comments by the author

5.1 By submission of 5 March 2001, the authors responded to the State party's observations.

5.2 Mr. Müller does not dispute that he could have made an application to change his surname in the terms of the Aliens Act. However, he contends that it is the procedure required for men who wish to change their surname, which is discriminatory. It would therefore have been contradictory to comply with the prescribed procedure.

5.3 With regard to the State party's allegation that Ms. Engelhard has not exhausted domestic remedies, the authors submit that it would have been futile for her to bring a claim to court separately of her husband's case, since her claim would not have been different from the first claim, which the Supreme Court of Namibia dismissed. The authors refer to the Committee's jurisprudence, Barzhig v. France,[6] where the Committee stated that domestic remedies need not be exhausted if it is inevitable that the claim will be dismissed or if a positive result is precluded by established jurisprudence of the highest domestic court. It is further submitted that throughout the national legal proceedings, Ms. Engelhard had supported her husband's application, and that, as such, her legal and factual situation was known to the domestic courts.

5.4 In relation to article 26, it is submitted that once there is a differentiation based on sex alone, there would have to be an extremely weighty and valid reason therefor. It should be considered whether the objectives enunciated by the State party are of sufficient importance to justify this differentiation based on sex. It is not disputed that a person's surname constitutes an important component of one's identity, but it is submitted that, as a consequence thereof, the equal right of partners in a marriage to choose either surname as the family name is worthy of the highest protection.

5.5 Furthermore, the State party's notions of a "long-standing tradition" does not justify the differentiation, since it only occurred in the mid-nineteenth century, and, with reference to the European Court decision Burghartz v. Switzerland, the interpretation must be made in the light of present day conditions, especially the importance of the principle of non-discrimination. To exemplify that tradition should not support discriminatory laws and practices, the authors refer to apartheid as South Africa's former traditional approach to promulgate laws to perpetuate a racially discriminatory process.

5.6 It is submitted that the State party's allegations that keeping the differentiation in Aliens Act section 9, paragraph 1 in the interest of public administration and the public at large, is not a rational objective, since this interest would not be lesser served should a couple contracting in a marriage have the choice of which of their surnames is to be used as their family name.

5.7 The authors contend that the procedure set out for a man who would like to assume his wife's surname are not as simple as contended by the State party, and refers to the procedure as described above (para. 3.1).

5.8 The authors also refer to the European Court of Human Rights' decision, Stjerna v. Finland,[7] where the Court stated that "For the purposes of article 14 [of the European Convention on Human Rights], a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim …", and they submit that there is no reasonable justification for the differentiation complained of. They contend that the Aliens Act section 9, paragraph 1 perpetuate the "long-standing tradition" of relegating a woman to a subservient status within marriage.

5.9 In relation to the State party's allegations regarding General Comment 19 on article 23 of the Covenant, it is submitted that it should be interpreted to include not only the choice of a family surname, but also the method in which such choice is effected. In this connection, the authors submit that a husband's application to change his surname, may or may not be approved by the Minister of Home Affairs, for example where the costs of advertising or prescribed fees are out of reach for the applicant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 In relation to all the alleged violations of the Covenant by Mr. Müller, the Committee notes that the issues have been fully raised under domestic procedures, and the State party has confirmed that Mr. Müller has exhausted domestic remedies. There are therefore no obstacles for finding the communication admissible under the Optional Protocol article 5, paragraph 2 with regard to Mr. Müller.

6.3 In relation to the claims by Ms. Engelhard, the State party has contested that domestic remedies have been exhausted. Even if Ms. Engelhard could have pursued her claim through the Namibian court system, together with her husband or separately, her claim, being quite similar to Mr. Müller's, would inevitably have been dismissed, as Mr. Müller's claim was dismissed by the highest court in Namibia. The Committee has established jurisprudence, (Barzhig v. France), that an author need not pursue remedies that are indisputably ineffective, and concludes therefore that Ms. Engelhard's claims are not inadmissible under the Optional Protocol, article 5, paragraph 2. Although the State party has abstained from commenting on the merits of Ms. Engelhard's claims, the Committee takes the view that it is not precluded from examining the substance of the case also with regard to her claims, as completely identical legal issues concerning both authors are involved.

6.4 The Committee has also ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.5 The Committee therefore decides that the communication is admissible as far as it may raise issues under articles 26, 23, paragraph 4, and 17, paragraph 1, of the Covenant.

6.6 The Committee has examined the substance of the authors' claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, paragraph 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.[8] A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, paragraph 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act, section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal security. The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

6.9 In the light of the Committee's finding that there has been a violation of article 26 of the Covenant, the Committee considers that it is not necessary to pronounce itself on a possible violation of articles 17 and 23 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, avoiding any discrimination in the choice of their common surname. The State party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for Namibia on 28 November 1994 by accession.

[2] See European Court of Human Rights, judgement A280-B of 22 February 1994.

[3] See General Comment No. 18 of 10 November 1989, paras. 7 and 12.

[4] See General Comment No. 19 of 27 July 1990, para. 7.

[5] See Views in Case No. 453/1991 of 31 October 1994.

[6] See Views in Case No. 327/1988 of 11 April 1991.

[7] See European Court of Human Rights, judgement A299B of 25 November 1994, para. 48.

[8] See Views Danning v. The Netherlands, Case No. 180/1984.

DD. Communication No. 921/2000, Dergachev v. Belarus (Views adopted on 2 April 2002, seventy-fourth session)*

Submitted by: Mr. Alexandre Dergachev

Alleged victim: The author

State party: Belarus

Date of communication: 28 September 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 April 2002,

Having concluded its consideration of Communication No. 921/2000, submitted to the Human Rights Committee by Mr. Alexandre Dergachev under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 28 September 1999, is Alexandre Dergachev, a Belarusian national. He claims to be a victim of a violation by Belarus of articles 2, 14 and 19 of the Covenant. He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of the individual opinion signed by Committee member Ms. Christine Chanet is appended.

The facts as presented by the author

2.1 On 21 March 1999, the author, a member of Belarus People's Front, a political party in Belarus Republic, carried a poster during a picket he had organized. The poster carried an inscription to the effect that: "Followers of the present regime! You have led the people to poverty for five years. Stop listening to lies. Join the struggle led by the Belarus People's Front for you."

2.2 On 29 March 1999, the author was tried in the Smorgon district court. The court considered the inscription on the poster as amounting to a call for insubordination against the existing government and/or to the destruction of the constitutional order of the Byelorussian Republic. It ruled accordingly that the poster constituted an administrative offence under the Belarus Code of Administrative Offences (art. 167, para. 2). Accordingly, the author was convicted and fined 5 million Belarussian roubles. It also ordered confiscation of the poster. Militia officers who were present on duty during the picket were summoned to the court as witnesses.

2.3 The author pleaded not guilty during the court hearings and argued that the expression on his poster implied solely a legitimate political expression in the context of democratic elections. On 21 April 1999, the Grodnenski regional court rejected the author's appeal. The author then appealed to the Supreme Court of the Republic of Belarus. On 9 June 1999, the Supreme Court, while allowing the conviction to stand, reduced the sentence imposed by the court and imposed a warning upon the author. Therewith, domestic remedies are claimed to have been exhausted.

The complaint

3.1 The author argues that his rights under articles 19 and 2 have been violated by his conviction for expressing a political opinion and disseminating factual information. In terms of the latter, he contends increasing levels of poverty and the perpetration of untruths by State officials have been independently and objectively demonstrated to be correct. The author also considers that the application in his case of the Law on Elections of the Republic of Belarus, which prohibits the nomination as candidate for Parliament of persons who have suffered an administrative conviction in the year prior to an election, violates these rights. Although the author does not invoke it, these arguments also appear to raise an issue under article 25 of the Covenant.

3.2 The author contends that his right under article 14 to an independent tribunal has been violated, in that the same President who the author criticized by his poster appointed the judges considering his case.

The State party's observations on admissibility and merits

4. By note verbale of 23 November 2000, the State party advised that on 31 August 2000, the Chairman of the Supreme Court of the Republic of Belarus cancelled all determinations earlier adopted regarding the author and closed his case. Accordingly, the State party submitted that there is no basis for further consideration of the communication.

The author's comments on the State party's submissions

5. By letter received in February 2001, the author responded to the State party's comments. The author objected to the State party's submission, on the basis that the State party had not stated whether or not it conceded a violation of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the requirement of the exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes that the State party has not argued that domestic remedies had not been exhausted at the time the communication was submitted.

6.4 As to the author's claim under article 14, the Committee considers that the mere allegation by the author that the judge in his case was not independent as judges are appointed by the President of the State party does not substantiate, for the purposes of admissibility, the author's claim that article 14 was violated. Accordingly, the Committee finds this claim inadmissible under article 2 of the Optional Protocol.

6.5 As regards the Law on Elections which prohibits the nomination as candidate for Parliament of persons who have been convicted in the year prior to an election, the Committee is of the opinion that this law raises issues under article 25 of the Covenant. However, since the conviction of the author was cancelled and the author is no longer prevented from standing for election, and bearing in mind that the author has not claimed that he was prevented from nomination as a candidate under this law, the Committee finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers the remainder of the communication sufficiently substantiated for the purposes of admissibility, and proceeds to the merits of the communication.

Examination of the merits

7.1 The Committee has examined the communication in the light of all information received by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee is of the view that the particular expression of political opinion expressed by the author in carrying the poster in question falls within the scope of freedom of expression protected under article 19 of the Covenant. The State party has not advanced that any of the restrictions set out in article 19, paragraph 3, of the Covenant are applicable. The Committee therefore considers that the conviction of the author for expression of his views amounted to a violation of his rights under article 19 of the Covenant, and notes that his conviction had not been annulled when the communication was submitted to the Committee.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violation of article 19 of the Covenant. However, with reference to article 4, paragraph 2, of the Optional Protocol, the Committee considers that the State party, by the annulment of the decisions against the author, subsequent to the submission of the communication, has rectified the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion of Ms. Christine Chanet

In my opinion the Committee is not in a position in the present case to determine the nature and extent of the authority of the Belarus Supreme Court or the circumstances in which the case came before the judge (Views, para. 4).

Accordingly, the decision by the judge of 31 August 2000 ending the proceedings and finding for the party cannot a priori be considered as not forming part of a decision falling within the context of domestic remedies which the applicant must have exhausted before submitting a communication to the Committee.

Mr. Degachev submitted his communication on 28 September 1999.

Without information as to the nature of the authority exercised by the Chairman of the Supreme Court and his role in proceedings under domestic remedies in the State party it is difficult for me to find that the subsequent intervention of the judge does not constitute an effective remedy in the sense of article 5, paragraph 2 (b), of the Optional Protocol.

(Signed) Christine Chanet

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

EE. Communication No. 923/2000, Mátyus v. Slovakia (Views adopted on 22 July 2002, seventy-fifth session)*

Submitted by:	Mr. Istvan Mátyus
Alleged victim:	The author
State party:	Slovakia**
Date of communication:	15 October 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2002,

Having concluded its consideration of Communication No. 923/2000, submitted to the Human Rights Committee by Mr. Istvan Mátyus under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Istvan Mátyus, a Slovakian citizen, residing in Slovakia at the time of submission of the communication. He claims to be a victim of violations by Slovakia of article 25, paragraph (a) and (c), of the International Covenant on Civil and Political Rights. He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

** The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 28 March 1993, the Slovak Republic notified its succession to the Covenant and Optional Protocol.

The facts as submitted by the author

2.1 The author states that, on 5 November 1998, the Roznava Town Council passed Resolution 193/98 establishing five voting districts in the region and 21 representatives in total, for the elections to the Roznava Town Council, due to take place on 18 and 19 December 1998. Each voting district was to have the following number of representatives: five in voting district number one; five in voting district number two; seven in voting district number three; two in voting district number four; two in voting district number five. In accordance with paragraph 9, section 1, of Law No. 346/1990 Coll. on elections to municipal bodies, "in every town, multi-mandate voting districts shall be established in which representatives shall be elected to the village or town council proportional to the number of inhabitants in the town, and at most 12 representatives in one electoral district".

2.2 According to the author, when comparing the number of residents per representative in the individual voting districts in the town of Roznava, he came up with the following figures: one representative per 1,000 residents in district number one; one per 800 residents in district number two; one per 1,400 residents in district number three; one per 200 residents in district number four; and one per 200 residents in district number five. The number of representatives in each district was not therefore proportional to the number of inhabitants therein. The author was a candidate in voting district number three but failed to secure a seat as he came number eighth and only seven deputies were elected for this district.

2.3 With respect to the requirement to exhaust domestic remedies, the author notes the following administrative and judicial means employed by him to seek redress.

- The author voiced a complaint on 5 November 1998 and sent a written complaint, referred to as a "Public Notice", on 20 November 1998, to the mayor of Roznava, under paragraph 13, section 4, of Law No. 369/1990 Coll. on municipal matters, alleging the "illegality" of Resolution 193/98. According to this law, the mayor has the power to veto the enforcement of a resolution of the town council, if it is determined that it violates the law. The author claims that his complaint was not considered.

- On 20 November 1998, the author submitted a request to the District Attorney in Roznava, to investigate the legality of Resolution 193/98, in accordance with paragraph 11, section 1, of Law No. 314/1996 Coll. on prosecutions. The District Attorney examined the author's request but found that the author failed to establish a breach of legislation.

- On 23 December 1998, the author submitted a petition to the President of the National Council, in accordance with paragraph 48, of Law No. 346/1990 Coll. on elections to municipal bodies. This law allows the National Council of the Slovak Republic to call new elections, no later than a week after the announcement of election results, if such elections were not in accordance with law. The author claims that he did not receive a response to either his petition or his reminder of 8 March 1999.

- On 29 December 1998, the author petitioned the Constitutional Court questioning the constitutionality of Resolution 193/98, under article 129 of the Constitution, and requesting the court to declare the elections invalid, in accordance with paragraph 63, of the Law No. 38/1993 Coll. on organization of the Constitutional Court. The Court considered but rejected the author's submission on 12 May 1999.

The complaint

3.1 The author contends that the rights of the "citizens of Roznava", under article 25 (a) and (c) of the Covenant, were violated as they were not given an equal opportunity to influence the results of the elections, in exercising their right to take part in the conduct of public affairs, through the election of representatives. In addition, the author states that their rights were violated as they were not given an equal opportunity to exercise their right to be elected to posts in the town council.

3.2 The author contends that his rights, under article 25 (a) and (c), were violated, as he would have needed substantially more votes to be elected to the town council than candidates in other districts, due to the fact that the number of representatives in each district was not proportional to the number of inhabitants therein. The author claims that this resulted in his loss of the election.

State party's submission on admissibility

4.1 By submission of 9 June 2000, the State party argues that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies, as the author failed to apply for the correct remedy on time and, therefore, lost his opportunity to challenge the resolution in question.

4.2 With regard to the author's claim that he made a complaint to the mayor of the Town Council of Roznava, the State party contends that it is not in a position to comment, as it is not aware of the contents or form of this notice. Once the contents of this complaint have been communicated to it, the State party reserves its right to comment thereon.

4.3 The State party confirms that the author lodged a motion with the District Attorney in Roznava to investigate the legality and constitutionality of Resolution 193/98, alleging that this resolution was contrary to section 9 of the Act No. 346/1990 Coll. on Municipal Elections, as amended by Act No. 331/1998 Coll., and contrary to article 30, paragraph 4, of the Slovak Republic's Constitution. The State party explains that this complaint was considered by the District Attorney, who determined that the complainant had failed to establish a breach of legislation. As to the question of constitutionality, the State party claims that this was not an issue that could be considered by the District Attorney's office. It explains the function of the District Attorney under Law No. 314/1996 as follows, "the prosecutor supervises the observance of laws and other generally binding legal standards in the course of action and the decision of public administration bodies; and also ensures that mainly the supervising bodies meet their legal obligations actively". Therefore, the District Attorney's office is not empowered to assess the constitutionality of such decisions.

4.4 Similarly, the State party explains that the petition to the President of the National Council of the Slovak Republic was dismissed, as the constitutionality of Resolution 193/98 is an issue that can only be considered by the Constitutional Court.

4.5 With regard to the author's application to the Constitutional Court, the State party explains that the Court dismissed the complaint made by the author, as the alleged violation did not occur during the time the election was held but during the preparatory phase of the election. The Court determined that the claimant should have contested Resolution 193/98 before the Constitutional Court immediately after its adoption by Roznava Town Council on 5 November 1998, and prior to the holding of the election itself. The State party contends that a declaration by the Constitutional Court at this late stage, that the elections were invalid, would have significantly interfered with the rights acquired in good faith by third parties, mainly deputies, who obtained their mandates bona fides and without violating the law, and would also have brought uncertainty into the public life of our society.

4.6 The State party affirms that the Constitutional Court is the only instance empowered to decide upon the constitutionality of a resolution which is alleged to violate any article of the Slovak Republic's Constitution. The State party contends that the author applied to the inappropriate organs for the protection of his rights, thereby missing the opportunity to apply for effective protection, guaranteed by the Constitution. According to the State party, "One of the principles of a State under the rule of law is the establishment of legal certainty, a precondition of which is the requirement to exercise one's rights in time. That means not only observing the period set by law for lodging a complaint, but also the exercise of the right at the time when the contested violation occurred."

Comments by the author

5. The author rejects the State party's contention that the Constitutional Court is the only court empowered to decide upon the constitutionality and legality of decisions by regional self-governing bodies. The author also rejects the contention that any such complaint to the Constitutional Court should have been filed immediately after the adoption of the resolution and during the preparatory phase of the election. According to the author, section 53 of clause 3 of the Act No. 38/1993, provides that a constitutional claim may be filed within a period of two months from the date the resolution attained its full legal force. Therefore, the author argues that, as he had at least up until 5 January 1999 (two months from the passing of the resolution) to file his complaint, and actually did so on 29 December 1998, he was well within the limitation period. With respect to the State party's claim that had the Constitutional Court declared the elections invalid it would have brought uncertainty into the public life of our society, the author stresses that it is in the best interest of the public to ensure adherence to the Constitution and human rights.

Admissibility decision

6.1 During the seventy-first session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the State party's argument that domestic remedies had not been exhausted, as the author had failed to apply the appropriate remedy in time. The Committee also noted that the author had applied various procedures to exhaust domestic remedies, from the date the resolution in question was passed, until his petition to the Constitutional Court. The Committee observed that the Constitutional Court did consider the issues raised by the author in his complaint and dismissed his claim, only after a complete review of the matters raised, on the ground that the author should have made the application earlier; during the preparatory phase of and prior to the elections. In addition, the Committee observed that the State party had failed to substantiate that an application, in a case like the author's, could be entertained by any administrative or judicial instance other than the Constitutional Court within a statutory period of time. The Committee was of the view that it would be unreasonable to have expected the author to anticipate, prior to the hearing of the case, the Constitutional Court's determination on the question of the delay in bringing the application. For these reasons, the Committee considered that the author had exhausted domestic remedies for the purposes of article 5, paragraph 2 (b) of the Optional Protocol.

6.3 Accordingly, on 21 March 2001, the Committee decided that the communication was admissible insofar as it relates to the author's rights under article 25 of the Covenant.

The State party's submission on the merits

7.1 By letter of 12 November 2001, the State party made its submission on the merits of the communication.

7.2 In its submission on the merits, the State party reiterates its arguments made at the admissibility stage and provides a summary of the Constitutional Court's judgement. The Constitutional Court found that in comparing the number of voters per deputy in the five different electoral districts there were five times more voters per candidate in electoral district No. 3 than in electoral district No. 5. For this reason the Court decided that Resolution 193/98 breached the author's constitutional rights as well as paragraph 9 of section 1 of Law No. 346/1990 Coll. on elections to municipal bodies.[1] However, the Court went on to say that basic rights and freedoms protected under the Constitution can only be protected to the extent that the enforcement of these rights do not restrict or nullify the rights of others. In this case, as the breach occurred at the time of the preparatory stage of the elections rather than at the hearing itself, the court was of the opinion that the author should have submitted his complaint prior to the elections, to avoid interfering with the rights of third parties, including elected council members, who had attained their positions in good faith. It was on this basis that the Court dismissed the author's complaint.

7.3 The State party acknowledges that there was an error in the setting up of electoral districts and regrets "the infringement of the author's right to be elected for a deputy of the town council under equal conditions …" and submits that had the complaint been filed during the preparatory stage of the elections, the Constitutional Court would have been in a position to cancel the resolution.

Comments by the author

8.1 By letter of 24 October 2001, the author responded to the State party's submission on the merits. The author reiterates the points made in his initial submission. He also submits that he received legal advice to the effect that he could not have taken an action in the Constitutional Court until the elections had taken place as prior to that there was no infringement of his constitutional rights, only a violation of the electoral law.

8.2 Furthermore, the author provides details of two constitutional actions, alleging breaches of law during the preparatory stages of local government elections, for which the Court declared the elections null and void. The author alleges that the issue of having to file the complaint before the elections were held, was not a bar to nullifying the elections. In these cases, on the issue of balancing the rights of the author with those of third parties, the author again makes reference to the two actions taken prior to his case where elections were cancelled without considering the rights of those elected. He also submits that the interest of every democratic society is to uphold the Constitution thereby guaranteeing essential human rights.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2. As regards the question whether article 25 of the Covenant was violated, the Committee notes that the Constitutional Court of the State party held that by drawing election districts for the same municipal council with substantial differences between the number of inhabitants per elected representative, despite the election law which required those voting districts to be proportional to the number of inhabitants, the equality of election rights required by the State party's constitution was violated. In the light of this pronouncement, based on a constitutional clause similar to the requirement of equality in article 25 of the Covenant, and in the absence of any reference by the State party to factors that might explain the differences in the number of inhabitants or registered voters per elected representative in different parts of Roznava, the Committee is of the opinion that the State party violated the author's rights under article 25 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Slovakia of article 25, paragraphs (a) and (c), of the Covenant.

11. The Committee acknowledges that cancelling elections after they have already taken place may not always be the appropriate remedy in the case of an inequality in the elections, especially when the inequality was inherent in the laws and regulations laid down before the elections, rather than irregularities in the elections themselves. Furthermore, in the specific circumstances of the case, given the time lapse since the elections in December 1998, the Committee is of the opinion that its finding of a violation is of itself a sufficient remedy. The State party is under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] According to the judgement, the author's rights under article 30, paragraph 3, of the Constitution which stipulates that "The right to vote shall be exercised through universal, equal and direct suffrage by secret ballot …" and paragraph 4, which stipulates that "Citizens shall have access to the elected and public offices under equal conditions", were breached.

FF. Communication No. 928/2000, Boodlal Sooklal v. Trinidad and Tobago (Views adopted on 25 October 2001, seventy-third session)*

Submitted by:	Mr. Boodlal Sooklal (represented by counsel, Ms. Natalia Schiffrin, Interights)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	2 February 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2001,

Having concluded its consideration of Communication No. 928/2000, submitted to the Human Rights Committee by Mr. Boodlal Sooklal under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, submitted on 2 February 2000, is Boodlal Sooklal, a citizen of Trinidad and Tobago, currently serving 50 years of concurrent sentences in a prison in Trinidad and Tobago. He claims to be a victim of violations of articles 9, paragraph 3, and 14, paragraph 3 (c) and (d), and paragraph 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

The facts as submitted by the author

2.1 In May 1989, the author was arrested and charged with the offences of sexual intercourse and serious indecency with minors. Following a preliminary inquiry in June 1992, he was released on bail on 27 July 1992. The author was held in custody from the time of his arrest to his release on bail, over three years after his arrest.

2.2 In February 1997, the author was tried in the High Court, where he pleaded not guilty. He was represented by a legal aid lawyer. He was convicted and sentenced to 12 strokes with the birch, as well as 50 years of concurrent sentences, equivalent to a sentence of 20 years after remission.

2.3 The author lodged an appeal, which came up for hearing at the Court of Appeal on 19 November 1997. He did not receive any advice from his legal aid lawyer regarding this appeal, and did not meet with his lawyer prior to the hearing. During the proceedings, the author's lawyer, told the court that she could not find any grounds for pursuing the appeal. Consequently, leave to appeal was refused and the sentence was reaffirmed.

2.4 According to counsel, the author cannot afford to hire a lawyer privately to take a constitutional action in relation to this case and has been unable to find counsel to do so on a pro bono basis. Counsel also states that even if the author were to find someone to represent him, the Constitution of Trinidad and Tobago does not guarantee a speedy trial or a right to a trial within a reasonable time and therefore no constitutional remedy for the delays would be effective in the circumstances.

The complaint

3.1 Counsel claims that the author is a victim of violations of articles 9, paragraph 3, and 14, paragraph 3 (c), as he was held in detention for an unreasonable time awaiting trial and was not tried without undue delay.

3.2 Counsel refers to the Committee's jurisprudence in particular, its decision in Steadman v. Jamaica,[1] at which the Committee held that in the absence of any reasons from the State party explaining its behaviour, a delay of approximately 27 months between the date of the applicant's arrest and the date of trial amounted to a violation of the State's obligations under articles 9, paragraph 3, and 14, paragraph 3 (c), to bring the accused to trial without undue delay.

3.3 Counsel submits that the facts of this case are not complex and it involves a limited number of witnesses and few allegations. Thus, counsel argues, it is not the type of case where a delay can be justified due to a complex factual situation. Counsel also submits that none of the delay in this case can be attributable to the author, who was in fact anxious to have his case heard as soon as possible.

3.4 Counsel submits that the State party is responsible for the entirety of the delay. She argues that, without explanation, the prosecution and judicial authorities subjected the author to a delay of approximately three years before conducting a preliminary inquiry into his case, and to a further delay of four years and nine months before bringing his case to trial. In addition, no reasons were given for detaining him in custody rather than releasing him with the requirement to reappear at trial, as required under article 9, paragraph 3, of the Covenant. According to counsel, the lapse of time of nearly eight years between the author's arrest and trial, is even greater than the period of pre-trial delay held in Steadman v. Jamaica, which the Committee considered unreasonable.

3.5 Furthermore, counsel submits, that nearly nine years after the incidents in question,[2] the fairness of the author's trial was severely prejudiced, due to the likelihood that witnesses called at the trial were less accurate in their recollection of events. In this regard, counsel notes that two of the witnesses were 10 and 12 years of age at the time of the events in question. She submits that it is unlikely that when they were close to 20 years of age, they could accurately testify to events in their childhood.

3.6 Counsel also claims that the author is a victim of a violation of article 14, paragraph 3 (d), of the Covenant, as he did not receive effective legal representation. In this regard, counsel submits that the author's lawyer declared to the Court of Appeal that she could find no grounds for an appeal, even though clear grounds did exist, in particular, the fact that the author had suffered a delay of nearly eight years awaiting trial and that this factor had apparently not been considered by the trial judge in his determination of the case.

3.7 Counsel submits that the right to effective representation is an inherent component in the right to a fair trial and the right to an appeal. She refers to the Committee's Views in Kelly v. Jamaica,[3] in which the Committee noted "measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice".

3.8 Counsel submits that the Committee has affirmed on several occasions that where counsel for an accused decides that there are no grounds for an appeal, he should consult with the accused and inform him in advance of his intention to withdraw the appeal.[4] This duty to inform the accused also extends to the court hearing the appeal. Counsel submits that in the case of Steadman v. Jamaica, in which the accused's lawyer told the court that there were no grounds for appeal, the Committee took the view that it could not question counsel's professional judgement, but added that "the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed so that he can consider any other remaining options open to him".

3.9 Counsel submits, that when the author's lawyer informed the Court that she could find no grounds to appeal the conviction, she was effectively withdrawing the author's appeal without the author being informed and, consequently, without his consent. Lastly, she states that there is no indication that the Court of Appeal made an inquiry as to whether the author had been duly advised of his counsel's intentions to withdraw the appeal. Counsel refers to the Committee's jurisprudence[5] in this regard and submits that these factors reveal a violation of the author's rights under article 14, paragraph 3 (d), as well as article 14, paragraph 5, of the Covenant.

3.10 Although counsel did not specifically raise an allegation of a violation of any of the rights protected under the Covenant with respect to the sentence of 12 strokes of the birch, the facts of the case raise an issue under article 7 of the Covenant.

Issues and proceedings before the Committee

4.1 The communication with its accompanying documents was transmitted to the State party on 17 May 2000. The State party has not responded to the Committee's request, under rule 91 of the rules of procedure, to submit information and observations in respect of the admissibility and merits of the communication, despite several reminders addressed to it. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

4.2 Before considering the claims contained in the communication, the Human Rights Committee must, in accordance with rule 87 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.3 The Committee notes that at the time of submission, Trinidad and Tobago was a party to the Optional Protocol. The withdrawal by the State party from the Optional Protocol on 27 March 2000, with effect as of 27 June 2000, does not affect the competence of the Committee to consider this communication.

4.4 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies yet to be exhausted by the author and has not raised any other objection to the admissibility of the claim. On the information before it, the Committee is of the view that the communication is admissible and proceeds to a consideration of the merits.

4.5 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

4.6 The Committee notes that the author was sentenced to 12 strokes of the birch and recalls its decision in Osbourne v. Jamaica[6] in which it decided that irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman or degrading treatment or punishment contrary to article 7 of the Covenant. In the present case, the Committee finds that by imposing a sentence of whipping with the birch, the State party has violated the author's rights under article 7.

4.7 The Committee notes counsel's contention that the State party has violated article 9, paragraph 3, as the author was held in detention for an unreasonable time prior to his trial. The State party did not provide any justification for the author's detention and its duration. The Committee notes that the author spent three years in detention prior to release on bail and considers, therefore, that the State party has violated article 9, paragraph 3, of the Covenant.

4.8 As to counsel's contention that the State party has violated article 14, paragraph 3 (c), as the author's trial was not held within a reasonable time after he was charged, the Committee notes that the author waited for a period of seven years and nine months from the time of his arrest to the date of his trial. The State party has provided no justification for this delay. In the circumstances, the Committee considers that this is an excessive period of time and, therefore, that the State party has violated article 14, paragraph 3 (c), of the Covenant.

4.9 The Committee notes counsel's contention that, because of the delay of seven years and nine months from the date of the author's arrest to his trial, the witnesses could not have been expected to testify accurately to events alleged to have taken place nine years previously, and that the fairness of the trial was seriously prejudiced. As it appears from the file that issues related to the credibility and assessment of the evidence were addressed by the High Court, the Committee takes the view that the effect of the delay on the credibility of the witnesses' testimonies does not give rise to a finding of a violation of the Covenant that would be separate from the conclusion reached above under article 14, paragraph 3 (c).

4.10 With regard to an alleged violation of article 14, paragraph 3 (d), the Committee notes that the State appointed defence counsel conceded that there were no grounds for appeal. The Committee, however, recalls its prior jurisprudence[7] and is of the view that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's right under article 14, paragraph 3 (d), has been violated.

4.11 The Committee is of the view that the same facts as referred to in paragraph 4.10 do not raise a separate issue under article 14, paragraph 5, of the Covenant.

5. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Trinidad and Tobago of articles 9, paragraph 3, 14, paragraph 3 (c) and (d), and article 7 of the Covenant.

6. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing compensation and the opportunity to lodge a new appeal, or should this no longer be possible, to due consideration of granting him early release. The State party is under an obligation to ensure that similar violations do not occur in the future. If the corporal punishment imposed on the author has not been executed, the State party is under an obligation not to execute the sentence.

7. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the

rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Communication No. 528/1993.

[2] She does not say when the incidents occurred.

[3] Communication No. 253/1987.

[4] Counsel refers to Kelly v. Jamaica, No. 253/1987, and Wright and Harvey v. Jamaica, No. 459/1991.

[5] Counsel refers to the case of Pinkney v. Canada, Communication No. 7/1978, where the applicant suffered a delay of over two years in receiving his trial transcript, and consequently alleged a violation of his right to a trial within a reasonable time as well as his right to an appeal. According to counsel, the Committee held that the right to be tried without undue delay should be applied in conjunction with the right … to review by a higher tribunal and that consequently there was a violation of both of these provisions taken together.

[6] Communication No. 759/97.

[7] In the following cases, the Committee decided that the withdrawal of an appeal without consultation, would amount to a violation of article 14, paragraph 3 (d), of the Covenant: Collins v. Jamaica (356/89), Steadman v. Jamaica (528/93), Smith and Stewart v. Jamaica (668/95), Morrison and Graham v. Jamaica (461/91), Morrison v. Jamaica (663/95), McLeod v. Jamaica (734/97), Jones v. Jamaica (585/94).

GG. Communication No. 932/2000, Gillot v. France (Views adopted on 15 July 2002, seventy-fifth session)*

Submitted by:	Ms. Marie-Hélène Gillot et al. (represented by Marie-Hélène Gillot)
Alleged victim:	The authors
State party:	France
Date of communication:	25 June 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 2002

Having concluded its consideration of Communication No. 932/2000 submitted by Ms. Marie-Hélène Gillot et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4 of the Optional Protocol

1. There are 21 authors, all French citizens, resident in New Caledonia, a French overseas community: Mr. Jean Antonin, Mr. François Aubert, Mr. Alain Bouyssou, Mrs. Jocelyne Schmidt (née Buret), Mrs. Sophie Demaret (née Buston), Mrs. Michèle Philizot (née Garland), Ms. Marie-Hélène Gillot, Mr. Franck Guasch, Mrs. Francine Keravec (née Guillot), Mr. Albert Keravec, Ms. Audrey Keravec, Ms. Carole Keravec, Mrs. Sandrine Aubert (née Keravec), Mr. Christophe Massias, Mr. Jean-Louis Massias, Mrs. Martine Massias (née Paris), Mr. Jean Philizot, Mr. Paul Pichon, Mrs. Monique Bouyssou (née Quero-Valleyo), Mr. Thierry Schmidt, Mrs. Sandrine Sapey (née Tastet). The authors claim to be victims of violations by France of articles 2 (1), 12 (1), 25 and 26 of the International Covenant on Civil and Political Rights. The authors are represented by Ms. Marie-Hélène Gillot, who is herself an author.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The facts as submitted by the authors

2.1 On 5 May 1998, two political organizations in New Caledonia, the Front de Libération Nationale Kanak Socialiste (FLNKS) and the Rassemblement pour la Calédonie dans la République (RPCR), together with the Government of France, signed the so-called Noumea Accord. The Accord, which forms part of a process of self-determination, established the framework for the institutional development of New Caledonia[1] over the next 20 years.

2.2 Implementation of the Noumea Accord led to a constitutional amendment in that it involved derogations from certain constitutional principles, such as the principle of equality of political rights (restricted electorate in local ballots). Thus, by a joint vote of the French Parliament and Senate, and approval of a draft constitutional amendment by the Congress, the Constitution Act of New Caledonia (No. 98-610) of 20 July 1998 inserted a title XIII reading "Transitional provisions concerning New Caledonia" in the Constitution. The title comprises the following articles 76 and 77:

> Article 76 of the Constitution provides that:
>
> > "The people of New Caledonia shall, before 13 December 1998, express their views on the provisions of the accord signed at Noumea on 5 May 1998 and published on 27May 1998 in the Journal Officiel of the French Republic. Those persons fulfilling the requirements established in article 2 of Act No. 88-1028 of 9 November 1988 shall be eligible to vote. The measures required for the conduct of the voting shall be taken by decree of the Council of State, after consideration by the Council of Ministers."
>
> Article 77 provides that:
>
> > "Following approval of the Accord in the referendum provided for in article 76, the Organic Law, adopted following consultation with the deliberative assembly of New Caledonia, shall establish, to ensure the development of New Caledonia with due respect for the guidelines provided for in the Accord and in accordance with the procedures necessary for its implementation: […] - regulations on citizenship, the electoral system […] - the conditions and time frame for a decision by the people concerned in New Caledonia on accession to full sovereignty."

2.3 An initial referendum was held on 8 November 1998. The Noumea Accord was approved by 72 per cent of those voting, and it was established that one or more referendums would be held thereafter. The authors were not eligible to participate in that ballot.

2.4 The authors contest the way in which the electorates for these various referendums, as established under the Noumea Accord and implemented by the French Government, were determined.

2.5 For the first referendum on 8 November 1998, Decree No. 98-733 of 20 August 1998 on organization of a referendum of the people of New Caledonia, as provided for by article 76 of the Constitution, determined the electorate with reference to article 2 of Act No. 88-1028 of 9 November 1988 (also determined in article 6.3 of the Noumea Accord), namely: "Persons registered on the electoral rolls for the territory on that date and resident in New Caledonia since 6 November 1988 shall be eligible to vote."

2.6 For future referendums, the electorate was determined by the French Parliament in article 218 of the Organic Law of New Caledonia (No. 99-209) of 19 March 1999 (reflecting article 2.2 of the Noumea Accord[2]), pursuant to which:

> "Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:
>
> (a) They must have been eligible to participate in the referendum of 8 November 1998;
>
> (b) They were not registered on the electoral roll for the referendum of 8 November 1998, but fulfilled the residence requirement for that referendum;
>
> (c) They were not registered on the electoral roll for the 8 November 1998 referendum owing to non-fulfilment of the residence requirement, but must be able to prove that their absence was due to family, professional or medical reasons;
>
> (d) They must enjoy customary civil status or, having been born in New Caledonia, they must have their main moral and material interests in the territory;
>
> (e) Having one parent born in New Caledonia, they must have their main moral and material interests in the territory;
>
> (f) They must be able to prove 20 years' continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest;
>
> (g) Having been born before 1 January 1989, they must have been resident in New Caledonia from 1988 to 1998;
>
> (h) Having been born on or after 1 January 1989, they must have reached voting age on the date of the referendum and have one parent who fulfilled the conditions for participation in the referendum of 8 November 1998.
>
> Periods spent outside New Caledonia for the performance of national service, for study or training, or for family, professional or medical reasons shall, in the case of persons previously domiciled in the territory, be included in the periods taken into consideration in order to determine domicile."

2.7 The authors, who did not fulfil the above criteria, state that they were excluded from the referendum of 8 November 1998 and that they will also be excluded from referendums planned from 2014 onwards.

2.8 The authors state that, in challenging these violations, they have exhausted all domestic remedies.

2.9 On 7 October 1998, the authors filed a joint petition before the Council of State for rescission of Decree No. 98-733 of 20 August 1998, and thus of the referendum of 8 November 1998 comprising the restricted electorate authorized for that purpose. In a decision of 30 October 1998 the Council of State rejected the petition. It stated in particular that the precedence accorded to international commitments under article 55 of the Constitution does not apply, in the domestic sphere, to constitutional provisions and that, in the case in point, the provisions of articles 2, 25 and 26 of the International Covenant on Civil and Political Rights, cited by the authors, could not take precedence over the provisions of the Act of 9 November 1988 (determining the electorate in relation to Decree No. 98-733 of 20 August 1998 on the referendum of 8 November 1998), which had constitutional status.

2.10 Each author in fact applied to the Noumea administrative commission to be included in the electoral rolls, and thus authorized to participate in the referendum of 8 November 1998. The Noumea court of first instance, seized of the matter by each author in connection with the commission's refusal to authorize registration, confirmed that decision.[3] The court of cassation, having been seized of the case, in a decision of 17 February 1999 rejected the appeals by each author on the ground that they did not meet the conditions established for the referendum of 8 November 1998 as set forth in article 76 of the Constitution.

2.11 The authors further consider that any appeal against the future but certain violation of their right to vote in referendums from 2014 onwards is futile and foredoomed. They point out that the Organic Law (No. 99-209) of 19 March 1999 was declared constitutional by the Constitutional Council in its decision No. 99-410 DC of 15 March 1999, notwithstanding the derogations from constitutional rules and principles; that the Constitutional Council cannot be seized by a private individual; and that no administrative or ordinary court holds itself competent to rescind or set aside a provision of organizational legislation even if, as claimed by the authors, it is in fact unconstitutional. They maintain that the precedent established by the decision of the Council of State of 30 October 1998 (see above) forecloses any review by an administrative judge of the compatibility of a law based explicitly in the Constitution with a treaty. The authors claim that this theory of the constitutional shield is also accepted by the Court of Cassation, which would mean the failure of any future application to an electoral judge. Lastly, the authors conclude that any appeal against denial of their right to vote in the referendums from 2014 onwards is irretrievably foredoomed, and might even be subject to a fine for improper appeal, or an order to meet expenses not included in the costs.

The complaint

3.1 In the first place, the authors consider that denial of their right to vote in the referendums of 1998 and from 2014 onwards is unlawful, as it violates an acquired and indivisible right, in contravention of article 25 of the International Covenant on Civil and Political Rights. In addition to being French citizens, they state that they are holders of voters' registration cards and are registered on the New Caledonia electoral roll. They explain that at the time of the referendum of 8 November 1998 they had been resident in New Caledonia for periods of between three years and four months and nine years and one month, and that two authors, Mr. and Mrs. Schmidt, were born in New Caledonia. They assert that their permanent residence is in New Caledonia, where they wish to remain, since the territory constitutes the centre of their family and professional lives.

3.2 In the second place, the authors maintain that denial of their right to vote constitutes discrimination against them which is neither justified nor reasonable nor objective. They contest the criteria established to determine the electorates for the referendums of 1998 and 2014 or thereafter on the grounds of the derogations from French electoral provisions[4] and the consequent violations of the International Covenant on Civil and Political Rights; in that regard they draw attention to the following discriminatory elements.

3.3 The authors first draw attention to discrimination affecting only French citizens in New Caledonia precisely because of their residence in the territory. They assert that the criteria regarding length of residence established for the referendums represent departures from the electoral code applicable to all French citizens, irrespective of place of residence. They claim that this results in (a) penalization of those who have opted to reside in New Caledonia, and (b) discriminatory treatment between French citizens in terms of the right to vote.

3.4 Secondly, the authors claim that there is discrimination between French citizens resident in New Caledonia according to the nature of the ballot in question. They call into question the existence of a dual electorate, one encompassing all residents for national elections, and the second restricted to a certain number of residents for local ballots.

3.5 Thirdly, the authors complain of discrimination on the basis of the ethnic origin or national extraction of French citizens resident in New Caledonia. They maintain that the French authorities have established an ad hoc electorate for local ballots, so as to favour Kanaks[5] and Caldoches,[6] presented as being of Caledonian stock, whose political representatives signed the Noumea Accord. According to the authors, the Accord was concluded to the detriment of other French citizens resident in New Caledonia[7] who originate in metropolitan France (including the authors), as well as Polynesians, Wallisians, Futunians and Asians. These persons represent a significant proportion of the 7.67 per cent of Caledonian electors deprived of the right to vote.

3.6 Fourthly, the authors maintain that the establishment of a restricted electorate on the basis of birth[8] amounts to discrimination between citizens who are nationals of a single State, namely France.

3.7 Fifthly, the authors view the criterion relating to the parental connection[9] as discriminatory.

3.8 Sixthly, the authors claim that they are victims of discrimination owing to the transmission of the right to vote by descent,[10] resulting from the criterion of parental link.

3.9 In the third place the authors maintain that the period of residence for authorization to vote in the referendum of 8 November 1998, namely 10 years, is excessive. They affirm that the Human Rights Committee found that a period of residence of seven years established under the Constitution of Barbados violated article 25 of the International Covenant on Civil and Political Rights.[11]

3.10 The authors also consider the period of residence determining the right to vote in referendums from 2014 onwards, namely 20 years, to be excessive. They again assert that the French authorities are seeking to establish an electorate of Kanaks and Caldoches for whom, moreover, the right to vote is maintained even in the event of lengthy absences from New Caledonia. They state that a period of residence of three years was established for the referendums on self-determination in the French Somali Coast[12] in 1959, the territory of the Afars and the Issas in 1976, and New Caledonia in 1987. The intent, according to the authors, was to avoid granting the vote to civil servants from metropolitan France on assignments of limited duration, generally less than three years, and thus without any intention of integrating, and for whom voting would have raised conflicts of interest. However, the authors stress that they are not in the situation of civil servants from metropolitan France in New Caledonia temporarily, but rather that of French citizens who have chosen to settle in New Caledonia permanently. They further assert that the requirement of 20 years' residence in New Caledonia contravenes General Comment No. 25 of the Human Rights Committee, in particular paragraph 6 thereof.[13]

3.11 The authors claim violations by France of articles 2, 25 and 26 of the International Covenant on Civil and Political Rights. They seek the restoration by France of their full political rights. They call upon France to amend the provisions of the Organic Law (No. 99-209) of 19 March 1999 that contravene the Covenant, so as to allow their participation in referendums from 2014 onwards.

The State party's observations on admissibility

4.1 In its observations of 23 October 2000, the State party considers, first, that the authors' communication does not seem to fall under any heading of inadmissibility. Inasmuch as the authors establish their exclusion from the New Caledonian electorate for the referendum of 8 November 1998 pursuant to the Noumea Accord and also from referendums on the future status of the territory of New Caledonia to be held between 2014 and 2019, and having filed appeals as available before the national courts - which were definitively dismissed - against the acts under domestic law that they are challenging, in the view of the State party the authors must be regarded as being able to claim, rightly or wrongly, that they are victims of a violation of the Covenant and as having satisfied the obligation of exhaustion of domestic remedies.

4.2 The State party raises issues of substance that, in its opinion, have a bearing on the admissibility of the communication.

4.3 In this regard, the State party asserts that the complaint of a violation of article 12, paragraph 1, of the Covenant, which is referred to in the authors' arguments but not included in their final comments, must be rejected as manifestly incompatible with that provision. The State party maintains that the procedures for determining the electorate for the referendums on the future status of the territory of New Caledonia, while incontrovertibly affecting the right to vote of certain citizens, have no relevance to liberty of movement or choice of residence by persons lawfully present in French territory, of which New Caledonia forms part.

4.4 The State party also asserts that invoking the provisions of articles 2, paragraph 1, and 26 of the Covenant is superfluous.

4.5 According to the State party, article 2, paragraph 1, of the Covenant sets forth the principle of non-discrimination in enjoyment of the rights recognized by the Covenant. For this reason, it can be invoked only in combination with another right appearing in the same instrument. In the present case the State party deems it pointless to invoke it in connection with article 25 on the freedom to vote, which in any event makes specific reference to article 2 in relation to the prohibition of any discrimination in this regard. In the view of the State party, the act of invoking article 25 of the Covenant in itself necessarily entails monitoring by the Committee of respect for article 2, paragraph 1.

4.6 The State party asserts that article 26 of the Covenant establishes a general prohibition of all discrimination arising under the law which, in contrast to the principle enshrined in article 2, paragraph 1, may, in accordance with the Committee's previous decisions,[14] be invoked independently. With regard to this general anti-discrimination clause, the State party is of the view that the reference to article 2, paragraph 1, made in article 25 of the Covenant constitutes lex specialis, establishing a level of protection which is at least equivalent, if not superior. The State party considers that invoking article 26 of the Covenant does not advance the authors' case any more than invoking article 25.

4.7 The State party thus concludes, without prejudice to the merits of the complaint of discrimination made by the authors, that its consideration from the standpoint of articles 2, paragraph 1, and 26 of the Covenant is pointless, inasmuch as the complaint can be just as validly assessed on the basis of the provisions of article 25 alone.

The authors' comments on the State party's observations concerning admissibility

5.1 In their comments of 20 February 2001, the authors note that the State party does not formally contest admissibility.

5.2 They reject the State party's objection in relation to article 12, paragraph 1, of the Covenant. They assert that liberty of movement within a State and the effective freedom of a national of that State to choose a residence, guaranteed by article 12 of the Covenant, exist only to the extent that such movement or establishment of a new residence is not penalized by the annulment of another Covenant right, namely the right to vote, which by its very nature is linked to residence. The authors consider that the right to change residence, as permitted under article 12, would have no meaning if such a choice meant being denied all civil rights in the new place of residence - for a period of 10-20 years.

5.3 The authors also contest the argument of inadmissibility adduced by the State party with regard to the superfluous nature of invoking article 2, paragraph 1, and article 26 of the Covenant. They accordingly maintain their view that the domestic legislative provisions that they are challenging violate both article 2, paragraph 1, in conjunction with the provisions of articles 25 and 26, and article 26 of the Covenant.

Additional observations by the State party on admissibility

6.1 In its observations dated 22 February 2001, the State party made its preliminary observations on the authors' assertion that they had been victimized. The State party contends that the authors cannot claim to be the victims of a violation of the provisions of the Covenant - within the meaning of article 2 of the Optional Protocol and rule 90 of the Committee's rules of procedure - as a result of the determination of the electorates in question unless that determination has had or will have the effect of excluding them from the referendums in question.

6.2 The State party notes, on the basis of the facts supplied by the authors, that most of the authors did not, at the time of the referendum of 8 November 1998, meet the 10-year residence requirement (two of them, however, Mr. and Mrs. Schmidt, claimed that they had resided in New Caledonia since birth. The State party affirms that it accordingly sees no reason for their exclusion from the referendum, unless the period of residence was interrupted, a point which they do not clarify). The State party concludes that the majority of the authors therefore have a demonstrated personal interest in contesting the conditions under which the November 1998 referendum was held.

6.3 On the other hand the State party considers that the information provided by the 21 authors indicates that by 31 December 2014 only Mrs. Sophie Demaret will be excluded from future referendums as a result of application of the 20-year residence requirement. According to the State party, the other 20 authors will have, on the assumption that they remain as they say they intend to do, in the territory of New Caledonia, a period of residence greater than 20 years and will thus be able to participate in the various referendums. The State party concludes that 20 of the 21 authors do not have a demonstrated personal interest in contesting the procedures for the organization of future referendums, and thus cannot claim to be victims of a violation of the Covenant. Consequently, that part of their communication is inadmissible.

6.4 The State party recalls its objection to (a) the complaint of a violation of article 12, paragraph 1, of the Covenant, in that it is manifestly incompatible with the provision cited, and (b) the invoking of article 2, paragraph 1, and article 26 of the Covenant in that they are superfluous.

The authors' comments on the State party's further observations concerning admissibility

7.1 In their comments of 9 May 2001, the authors reject the State party's objection in relation to the 20 authors concerning the part of the petition relating to future ballots. They consider that the State party has not argued the case for inadmissibility concerning them in its submission of 23 October 2000, and that its objection dated 22 February 2001 is tardy. They further submit that the 20 authors would be unable to participate in referendums after 2014 if, in conformity with their right under article 12 of the Covenant, they were to temporarily leave New Caledonia for a period which would prevent them from fulfilling the condition of 20 years' continuous residence. They point out that the two authors born in New Caledonia, Mr. and Mrs. Schmidt, were not allowed to vote in the referendum of 8 November 1998 since they had lived outside the territory between 1988 and 1998 and the condition of 10 years' continuous residence had no longer been fulfilled.

7.2 The authors also maintain the part of their communication relating to articles 2, paragraph 1, 12, paragraph 1, and 26 of the Covenant, and therefore contest the State party's argument that the communication is inadmissible.

The State party's observations on the merits

8.1 In its observations of 22 February 2001, the State party develops its argument on the merits of the part of the communication which it considers admissible, namely, the complaint of a violation of article 25 of the Covenant.

8.2 It recalls that, according to the broad interpretation of article 25 by the Human Rights Committee in its General Comment No. 25 of 12 July 1996, that article, inter alia, establishes the right of citizens to vote at elections and referendums (cf. para. 10 of the General Comment). However, the Committee admits that this right may be subject to restrictions, provided they are based on reasonable criteria (idem). It further states that discriminatory criteria such as those prohibited in article 2, paragraph 1, of the Covenant may not serve as a basis for such restrictions (cf. para. 6).

8.3 The State party explains that the referendums which are the subject of the present dispute concern the institutional development of New Caledonia and the possibility that the territory may accede to independence. They form part of a process of self-determination by the people of this territory, even if they do not all have the direct purpose of determining the question of the territory's accession to full sovereignty. In the State party's view, the considerations which led to the adoption of article 53 of the Constitution, which provides that "no cession … of territory is valid without the consent of the population concerned", are therefore valid for such referendums (whether or not this article is applicable to them). The State party considers that it is therefore in the nature of these referendums that they should be limited to eliciting the opinion of not the whole of the national population, but the persons "concerned" with the future of a limited territory who prove that they possess certain specific characteristics.

8.4 The State party pursues its argument by confirming that the electorate determined, in conformity with the options chosen by the negotiators of the Noumea Accords, for the referendums in dispute is in fact a "restricted" electorate, which differs from the "ordinary" electorate, corresponding to persons included on the electoral rolls.

8.5 The State party also confirms that to the condition of inclusion on the electoral rolls was added, for the first referendum held in November 1998, a condition of 10 years' residence as at the date of the ballot, and for future referendums it is required of the electors either that they were permitted to participate in the first referendum or that they are able to prove specific links with the territory of New Caledonia (birth, family ties, etc.) or, failing that, that they will have been living in the territory for 20 years on the date of the referendum in question.

8.6 In the view of the State party, the authors do not seem to question the principle of the limitation of the electorate to the population concerned. However, the State party recalls that, in support of their complaint of a violation of article 25 of the Covenant, they adduce the following arguments: violation of the right to vote; discrimination between French citizens resident in New Caledonia and other citizens; discrimination between the Caledonian residents themselves according to the nature of the ballots; discrimination according to ethnic origin or extraction; discrimination according to place of birth; discrimination according to family ties; discrimination on the ground of transmission of the right to vote by descent; excessive period of residence in order to be authorized to participate in the first referendum; excessive period also for authorization to participate in future referendums; withdrawal of the right to vote from the authors.

8.7 By way of introduction, the State party points out that, insofar as article 25 of the Covenant provides that the right to participate in a vote may be subject to reasonable limitations, the authors' argument that they enjoy an absolute right to take part in the referendums in question must be rejected.

8.8 The State party considers that the debate is therefore limited to the question of the compatibility of the restrictions imposed on the electorate with the provisions of article 25 of the Covenant. On this point, in the opinion of the State party, the authors' closely-argued case seems to be built on two main contentions: the criteria used to determine the electorate are discriminatory; and the periods set for length of residence are excessive.

8.9 The State party observes that the contested legislative instrument merely incorporates the choices freely made by the representative local political organizations which negotiated the Noumea Accords. In its view, therefore, the legislature, by incorporating these choices - which it was by no means required to do - manifested its concern to take account of the opinion of the representatives of the local populations concerning the procedures for implementation of a process aiming at their self-determination. The State party considers that this approach was such as to guarantee the free choice of their political status, which article 25 of the Covenant precisely aims to protect (cf. above-mentioned General Comment of the Committee, para. 2).

8.10 Nevertheless, the State party does not dispute that those choices must be made in conformity with the provisions of article 25 of the Covenant. In this respect, it considers that these provisions have been fully observed in this case.

8.11 The State party explains, first, that the complaint on the ground of the discriminatory character of the criteria used to determine the electorate is unfounded.

8.12 In its opinion, there is in fact an objective difference in situation with regard to the referendums in dispute between the persons authorized to vote and those not authorized to vote.

8.13 In this connection, the State party recalls that the restrictions imposed on the electorate are dictated by the very purpose of the referendums. It maintains that this is all the more true since, as the authors themselves emphasize, their names are included on the "ordinary" electoral rolls and they enjoy without restriction the right to vote in ballots other than those relating to the territory of New Caledonia. In the State party's opinion, it is thus incorrect to say that they have been deprived of their right to vote. This right to vote has been restricted, with the result that the authors have not been or will not be (in the case of just one of their number) consulted on questions in which they are not regarded as being "concerned".

8.14 The State party asserts that it is natural to consider that persons "concerned" in votes held in the context of a self-determination process are those who prove that they have particular ties to the territory whose fate is in question, ties which legitimize their participation in the vote.

8.15 The State party observes that, in the present case, the contested system enables these ties to be assessed in the light of several alternative, non-cumulative, elements: length of residence in the territory; possession of customary civil status; existence of moral and material interests in the territory, combined with the birth of the person concerned or his parents in the territory; for persons of full age born after the 1998 referendum, the fact that their parents were permitted to participate in that referendum.

8.16 The State party affirms that these are objective criteria, which have no connection with ethnic origin or political choices and which incontrovertibly establish the strength of the ties of the persons concerned with the territory of New Caledonia. In the State party's opinion, there is no doubt that persons fulfilling at least one of the conditions established are more concerned in the territory's future than those who fulfil none of the conditions.

8.17 The State party concludes that the determination used for the electorates thus has the effect of treating differently persons in objectively different situations as regards their links with the territory. For this reason, in its view, the determination cannot be deemed discriminatory.

8.18 The State party adds that, even admitting, solely for the sake of argument, that the determination of the electorates amounts to positive discrimination, this would not be contrary to article 25 of the Covenant.

8.19 In this connection, the State party recalls that, in its General Comment No. 18, the Committee observes: "... in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant".

8.20 Conversely, in the State party's view, article 1, paragraph 4, of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits such action when, on the pretext of positive discrimination, it would "lead to the maintenance of separate rights for different racial groups".

8.21 In connection with these provisions, the State party says it is apparent that if the purpose of the organizational procedures for the referendum in question was to favour one community (e.g. the Kanak community) by allowing only that community to participate in the vote or by granting its members preferential representation or treatment through a specific college, that discriminatory treatment would certainly not be regarded as an admissible restriction under article 25 of the Covenant.

8.22 The State party emphasizes, however, that, as Louis Joinet, the Senior Advocate-General,[15] has noted in his arguments, when the Court of Cassation came to consider the discrimination complaint in question, the criteria used for the composition of the electorate are based not on a distinction between Caldoches and Melanesians, but on the distinction made between national residents in the light of the length of their domicile on the island and their demonstrated links with it, whether their origin be Melanesian, European, Wallisian, etc.

8.23 The State party explains that these criteria do indeed favour long-standing residents over more recent arrivals. In its opinion, if for this reason, and despite the arguments adduced above, that could be regarded as an act of positive discrimination, it would not in principle be contrary to the provisions of the Covenant, as pointed out by the Committee in its above-mentioned General Comment No. 18. It could be censured only if it had the effect of maintaining different rights for separate racial groups, which, because of the criteria adopted, is not the case in the present situation.

8.24 The State party affirms, secondly, that the complaint that the restriction imposed on the electorate on the basis of length of residence in New Caledonia is unreasonable is likewise unfounded.

8.25 The State party refers to the authors' argument that the 10-year and 20-year residence requirements set for participation in past and future referendums are contrary to article 25 of the Covenant, in that these limits are too high and lead to the exclusion of a substantial part of the electorate.

8.26 The State party points out that the authors cite in support of that argument a decision of the Committee that a period of seven years' residence set by the Constitution of Barbados for the right to stand for election to the House of Assembly was unreasonable. The State party affirms that, in fact, that was not a position adopted by the Committee, but a single opinion expressed by one of its 18 members at a meeting,[16] which was never adopted by the Committee itself. At no time, therefore, has the Committee reached a decision of the kind mentioned by the authors. The State party adds that the Committee did not in fact raise this question on the occasion of the submission of the second periodic report of Barbados in 1988.[17]

8.27 In addition, the State party points out that, in its General Comment on article 25 of the Covenant,[18] the Committee cites no case based on a period of residence considered to be unreasonable.

8.28 Furthermore, the State party considers that, in the present case, if participation in the referendum of November 1998 was subject to a 10-year period of residence and if participation in future referendums will require 20 years' residence, in cases where the persons concerned do not meet any of the other conditions established, these conditions cannot be regarded as unreasonable.

8.29 The State party says it is true that the periods of residence thus established exceed the three-year limit set for a number of earlier referendums (e.g. the Act of 22 December 1966 concerning the referendum relating to the French Somali Coast; the Act of 28 December 1976 concerning the referendum relating to the territory of the Afars and the Issas).

8.30 However, in the opinion of the State party, there are no grounds for thinking that these minimum periods, which meet the need to limit referendums to people having genuine local roots, were unreasonable in the light of article 25 of the Covenant.

8.31 The State party argues that, firstly, these length of residence requirements meet the concern, expressed by the representatives of the local population during the negotiation of the Noumea Accord, to ensure that the referendums will reflect the will of the population "concerned" and that their results cannot be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it. The State party considers that this concern is perfectly legitimate in the case of referendums held in the context of a self-determination process.

8.32 The State party considers, secondly, that these conditions excluded only a small proportion of the resident population (about 7.5 per cent) from the first referendum and, unless there is a major demographic change, this will also be the case with future referendums, for which the length of residence criterion will not in fact be the only criterion establishing the right to vote.

8.33 Lastly, in the opinion of the State party, no decision of the Committee provides grounds in the present case for regarding these requirements, which do not appear unreasonable either in their justification or in their practical consequences, as being contrary to the provisions of article 25 of the Covenant.

8.34 For all these reasons, the State party considers that the complaint of violation of article 25 of the Covenant cannot but be dismissed.

Comments by the authors on the State party's observations concerning the merits of the communication

9.1 In their comments of 9 May 2001, the authors again allege a violation by France of article 12, paragraph 1, of the Covenant, on the basis of their previous argument and with reference to paragraphs 2, 5 and 8 of the Committee's General Comment No. 27 (67) on freedom of movement.[19]

9.2 They reassert that they maintain the part of their communication relating to a violation of article 2, paragraph 1, of the Covenant.

9.3 They reassert their position that the Committee should consider the violation of article 26 of the Covenant, irrespective of all other provisions, or in relation to article 25.

9.4 They refute the State party's argument that there has been no violation of article 25 of the Covenant.

9.5 They again assert, first, their absolute right, as citizens fulfilling all the objective conditions for elector status (in particular, those relating to age of majority, non-deprivation of civil rights following a conviction under ordinary law, or major disability) enabling them to vote in all political ballots held at their place of residence for electoral purposes.

9.6 The authors recall that they consider themselves to be among the population "concerned" by the November 1998 and future referendums on the status of New Caledonia. They cite their personal interest and their sufficiently strong ties to the territory. They further state that French citizens resident in New Caledonia have been exclusively concerned in their daily lives by the "Caledonian Act" since the adoption of the Organic Law (No. 99-209) of 19 March 1999.

9.7 They further submit that the principle of "positive discrimination" cannot be applied in electoral matters and cannot be inferred from the Committee's General Comment No. 18.

9.8 They explain, incidentally, that the Committee establishes a prerequisite for the adoption of measures of positive discrimination, namely, their temporary character and the fact that the general situation of certain population groups prevents or impairs the enjoyment of human rights.

9.9 In the authors' opinion, the 20-year continuous residence requirement for participation in future ballots represents not a limitation in time, but a permanent situation of de jure exclusion of the authors from future Caledonian nationality.

9.10 The authors further raise the question how the exercise of their right to vote and that of people in their situation prevents or impairs the enjoyment of the human rights of other Caledonian communities. They again state that the provisions governing participation in the referendums of 1998 and 2014 or thereafter have been devised by the French authorities as a form of electoral favouritism allowed for purely political reasons. In their opinion, these authorities conceived, through the Noumea Accord, the falsely objective criterion of a lengthening of the period of residence in order to establish indirect and insidious discrimination.

9.11 They consider that the State party has not offered a serious answer to their criticism relating to the excessive period of continuous residence as a condition for voting in the 1998 and future ballots.

9.12 For their part, the authors adduce the following arguments. They note, first, that the two main communities in New Caledonia comprise (a) inhabitants of Melanesian origin (44 per cent of the population), and (b) inhabitants of Caldoche origin (30 per cent of the population). They maintain that (a) the supporters of independence have always been in a minority, and (b) since the result of the self-determination referendum of 1987, which massively rejected independence, any other similar ballot would, in the current context, lead to the rejection of independence.

13.1 The authors maintain, secondly, that the criteria used to determine the electorates in local ballots represent a departure from French rules on electoral matters (the right to vote can be made dependent only on the criterion of inclusion on an electoral roll, either of the commune of domicile, irrespective of the period of residence, or of the commune of actual residence for at least 6 months) and thereby impose on them discriminatory restrictions which are contrary to the International Covenant on Civil and Political Rights.

13.2 In order to determine the discriminatory or non-discriminatory character of the criteria in dispute, in conformity with its above-mentioned decisions, the Committee considers that the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality.

13.3 In the present case, the Committee has taken note of the fact that the local ballots were conducted in the context of a process of self-determination of the population of New Caledonia. In this connection, it has taken into consideration the State party's argument that these referendums - for which the procedures were fixed by the Noumea Accord and established according to the type of ballot by a vote of Congress[23] or Parliament[24] - must, by virtue of their purpose, provide means of determining the opinion of, not the whole of the national population, but the persons "concerned" by the future of New Caledonia.

13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.

13.5 In relation to the authors' complaints, the Committee observes, as the State party indeed confirms, that the criteria governing the right to vote in the referendums have the effect of establishing a restricted electorate and hence a differentiation between (a) persons deprived of the right to vote, including the author(s) in the ballot in question, and (b) persons permitted to exercise this right, owing to their sufficiently strong links with the territory whose institutional development is at issue. The question which the Committee must decide, therefore, is whether this differentiation is compatible with article 25 of the Covenant. The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.

13.6 The Committee has, first of all, to consider whether the criteria used to determine the restricted electorates are objective.

13.7 The Committee observes that, in conformity with the issue in each ballot, apart from the requirement of inclusion on the electoral rolls, the criteria used are: (a) for the 1998 referendum relating to the continuation or non-continuation of the process of self-determination, the condition of length of residence in New Caledonia; and (b) for the purpose of future referendums directly relating to the option of independence, additional conditions relating to possession of customary civil status, the presence in the territory of moral and material interests, combined with birth of the person concerned or his parents in the territory. It accordingly follows, as the date for a decision on self-determination approaches, that the criteria are more numerous and take into account the specific factors attesting to the strength of the links to the territory. To the length of residence condition (as opposed to the cut-off points for length of residence) for determining a general link with the territory are added more specific links.

13.8 The Committee considers that the above-mentioned criteria are based on objective elements for differentiating between residents as regards their relationship with New Caledonia, namely the different forms of ties to the territory, whether specific or general - in conformity with the purpose and nature of each ballot. The question of the discriminatory or non-discriminatory effects of these criteria nevertheless arises.

13.9 With regard to the authors' complaint of discrimination in the 1998 referendum on the basis of their ethnic origin or national extraction, the Committee takes note of their argument that residents of New Caledonia from metropolitan France (including the authors), Polynesians, Wallisians, Futunians, West Indians and Reunion Islanders accounted for a significant proportion of the 7.67 per cent of Caledonian voters excluded from that referendum.[25]

13.10 In the light of the foregoing, the Committee considers that the criterion used for the 1998 referendum establishes a differentiation between residents as regards their relationship to the territory, on the basis of the length of "residence" requirement (as distinct from the question of cut-off points for length of residence), whatever their ethnic origin or national extraction. The Committee also considers that the authors' arguments lack details concerning the numbers of the above-mentioned groups - whether or not they represent a majority - within the 7.67 per cent of voters deprived of their right to vote.

13.11 The Committee therefore considers that the criterion used for the 1998 referendum did not have the purpose or effect of establishing different rights for different ethnic groups or groups distinguished by their national extraction.

13.12 Concerning the authors' complaints of discrimination on the basis of birth, family ties and the transmission of the right to vote by descent (the latter violation deriving, according to the authors, from the criteria on family ties), and hence resulting from the criteria established for referendums from 2014 onwards, the Committee considers, first, that residents meeting these criteria are in a situation that is objectively different from that of the authors whose link to the territory is based on length of residence. Secondly, the Committee notes (a) that length of residence is taken into account in the criteria established for future ballots, and (b) that these criteria may be used alternatively. Hence the identification of voters from among the French residents of New Caledonia is based not solely on particular ties to the territory (such as birth and family ties) but also, in their absence, on length of residence. Consequently, every specific or general link to the territory - identified by means of the criteria on ties to New Caledonia - was applied to French residents.

13.13 Finally, the Committee considers that in the present case the criteria for the determination of restricted electorates make it possible to treat differently persons in objectively different situations as regards their ties to New Caledonia.

13.14 The Committee also has to examine whether the differentiation resulting from the above-mentioned criteria is reasonable and whether the purpose sought is lawful vis-à-vis the Covenant.

13.15 The Committee has taken note of the authors' argument that such criteria, although established by the Constitutional Act of 20 July 1998 and the Organic Law of 19 March 1999, not only represented a departure from national electoral rules, but were also unlawful vis-à-vis the Covenant.

13.16 The Committee recalls that, in the present case, article 25 of the Covenant must be considered in conjunction with article 1. It therefore considers that the criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. Such criteria, therefore, can be justified only in relation to article 1 of the Covenant, which the State party does. Without expressing a view on the definition of the concept of "peoples" as referred to in article 1, the Committee considers that, in the present case, it would not be unreasonable to limit participation in local referendums to persons "concerned" by the future of New Caledonia who have proven, sufficiently strong ties to that territory. The Committee notes, in particular, the conclusions of the Senior Advocate-General of the Court of Cassation, to the effect that in every self-determination process limitations of the electorate are legitimized by the need to ensure a sufficient definition of identity. The Committee also takes into consideration the fact that the Noumea Accord and the Organic Law of 19 March 1999 recognize a New Caledonian citizenship (not excluding French citizenship but linked to it), reflecting the common destiny chosen and providing the basis for the restrictions on the electorate, in particular for the purpose of the final referendum.

13.17 Furthermore, in the Committee's view, the restrictions on the electorate resulting from the criteria used for the referendum of 1998 and referendums from 2014 onwards respect the criterion of proportionality to the extent that they are strictly limited ratione loci to local ballots on self-determination and therefore have no consequences for participation in general elections, whether legislative, presidential, European or municipal, or other referendums.

13.18 Consequently, the Committee considers that the criteria for the determination of the electorates for the referendums of 1998 and 2014 or thereafter are not discriminatory, but are based on objective grounds for differentiation that are reasonable and compatible with the provisions of the Covenant.

14.1 Lastly, the authors argue that the cut-off points set for the length of residence requirement, 10 and 20 years respectively for the referendums in question, are excessive and affect their right to vote.

14.2 The Committee considers that it is not in a position to determine the length of residence requirements. It may, however, express its view on whether or not these requirements are excessive. In the present case, the Committee has to decide whether the requirements have the purpose or effect of restricting in a disproportionate manner, given the nature and purpose of the referendums in question, the participation of the "concerned" population of New Caledonia.

14.3 In addition to the State party's position that the criteria used for the determination of the electorates favour long-term residents over recent arrivals owing to actual differences in concern with regard to New Caledonia, the Committee notes, in particular, that the cut-off points for length of residence are designed, according to the State party, to ensure that the referendums reflect the will of the population "concerned" and that their results cannot be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it.

14.4 The Committee notes that the 21 authors were excluded from the 1998 referendum because they did not meet the 10 years' continuous residence requirement. It also notes that one author will not be able to participate in the next referendum because of the 20 years' continuous residence requirement, whereas the other 20 authors do, as things stand, have the right to vote in that referendum - 18 authors on the basis of the residence criterion and 2 others on the strength of having been born in New Caledonia, their ethnic origin and national extraction being of no consequence in this respect.

14.5 The Committee considers, first, that the cut-off points adopted do not have a disproportionate effect, given the nature and purpose of the referendums in question, on the authors' situation, particularly since their non-participation in the first referendum manifestly has no consequences for nearly all of them as regards the final referendum.

14.6 The Committee further considers that each cut-off point should provide a means of evaluating the strength of the link to the territory, in order that those residents able to prove a sufficiently strong tie are able to participate in each referendum. The Committee considers that, in the present case, the difference in the cut-off points for each ballot is linked to the issue being decided in each vote: the 20-year cut-off point - rather than 10 years as for the first ballot - is justified by the time frame for self-determination, it being made clear that other ties are also taken into account for the final referendum.

14.7 Noting that the length of residence criterion is not discriminatory, the Committee considers that, in the present case, the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any article of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] New Caledonia (South-west Pacific island group; area: 19,058 km^2; population: 197,000; capital: Noumea), colonized by France in 1853, has undergone several changes in institutions. Initially administered by a governor, it became an overseas territory under the 1946 French Constitution. Until 1988 the territory was in a legal impasse between the granting of a decree of autonomy and restoration of State trusteeship. From 1984 onwards the situation was characterized by violence between pro- and anti-independence factions. Mediation by the French authorities through a "dialogue mission" to restore civil order led in 1988 to a local political agreement and a set of conclusions, pursuant to which "the future of New Caledonia can be determined only through a vote on self-determination (…). The provisions of this accord shall be subject to approval by the people of France in a referendum". The negotiators were seeking to avoid a repetition of the experiment attempted with the previous local referendum on self-determination in 1987. That had led to confrontation between the two parties over the "cut-off question" whether to accede to independence or remain part of the French Republic, followed by a resumption of violence, resulting in loss of life, with political failure as the outcome. Further to the Matignon Accords of 26 June 1988 resulting from the dialogue mission, the question of self-determination was put to a referendum on the basis of universal suffrage by the French Government on 6 November 1988. The outcome was the Referendum Act (No. 88-1028) of 9 November 1988, embodying statutory provisions in preparation for New Caledonia's self-determination. The Act, which was approved by 57 per cent of the votes cast, established December 1998 as the date for holding a referendum in New Caledonia. Coexistence between the two communities led, in 1998, to a second phase, namely the Noumea Accord. Pursuant to the Accord there was a decision, by mutual agreement, to again extend the time frame and to pursue the process in the context of a new agreement. The Accord recognizes the "shadow of colonization" and makes provision for the establishment of a new legal entity under the French Constitution. It also provides for significant transfers of State authority to the territory of New Caledonia. In a phased, irreversible process, New Caledonia will ultimately enjoy general competence in all spheres, with the exception of the system of justice, public order, defence, finance and, to a large extent, foreign affairs. After the transition period, these other prerogatives of the State could be transferred to New Caledonia following approval by the people concerned. The Accord also recognizes New Caledonian citizenship: "The concept of citizenship establishes the basis for the restrictions on the electorate for elections to the institutions of the country and the final referendum." It further provides that "New Caledonian citizens" are to take a decision, within a 15-to 20-year time frame, on accession to independence; if they do not choose independence, autonomy will be maintained.

[2] Article 2.2 of the Noumea Accord: "The electorate for the referendums on the political organization of New Caledonia to be held once the period of application of this Accord has ended (sect. 5) shall consist only of: voters registered on the electoral rolls on the dates of the referendums provided for under section 5 who were eligible to participate in the referendum provided for in article 2 of the Referendum Act, or who fulfilled the conditions for participating in that referendum; those who are able to prove that any interruptions in their continuous residence in New Caledonia were attributable to professional or family reasons; those who have customary status or were born in New Caledonia and whose property and personal ties are

mainly in New Caledonia; and those who, although they were not born in New Caledonia, have one parent born there and whose property and personal ties are mainly in New Caledonia. Young people who have reached voting age and are registered on the electoral rolls and who, if they were born before 1988, resided in New Caledonia from 1988 to 1998, or, if they were born after 1988, have one parent who fulfilled or could have fulfilled the conditions for voting in the referendum held at the end of 1998, shall also be eligible to vote in these referendums. Persons who, in 2013, are able to prove that they have resided continuously in New Caledonia for 20 years may also vote in these referendums."

[3] Rulings dated 19 October 1998 on the petition by Mr. Jean Etienne Antonin; 23 October 1998 on the petitions by Mr. Alain Bouyssou, Mrs. Jocelyne Schmidt (née Buret), Mrs. Sophie Demaret (née Buston), Mrs. Michèle Philizot (née Garland), Mr. Jean Philizot, Mrs. Monique Bouyssou (née Quero-Valleyo), Mr. Thierry Schmidt; 26 October 1998 on the petitions by Mr. François Aubert, Ms. Marie-Hélène Gillot, Mr. Franck Guasch, Mrs. Francine Keravec (née Guillot), Mr. Albert Keravec, Ms. Audrey Keravec, Ms. Carole Keravec, Mrs. Sandrine Aubert (née Keravec), Mr. Christophe Massias, Mr. Jean-Louis Massias, Mrs. Martine Massias (née Paris), Mr. Paul Pichon and Mrs. Sandrine Sapey (née Tastet).

[4] Under the French Electoral Code, article L.11, exercise of the right to vote requires registration on an electoral roll, either in the commune of domicile, irrespective of the length of residence, or in the commune of actual residence once six months have elapsed.

[5] Kanaks: Melanesian community present in New Caledonia for approximately 4,000 years.

[6] Caldoches: persons of European descent present in New Caledonia since colonization in 1853.

[7] According to incomplete information supplied by the authors, of the 197,000 inhabitants of New Caledonia, 34 per cent are of European origin (including the Caldoches), 3 per cent of Polynesian origin, 9 per cent Wallisian and 4 per cent Asian.

[8] Organic Law (No. 99-209), art. 218, (d) and (e), of 19 March 1999.

[9] Organic Law (No. 99-209), art. 218 (e) and (h) of 19 March 1999.

[10] Organic Law (No. 99-209), art. 218, (e) and (h) of 19 March 1999.

[11] The authors give the following reference: Human Rights Committee Yearbook, 1981-1982, vol. 1, CCPR/3. In fact, as emphasized below (paras. 8.26 and 8.27) by the State party, this was not a position adopted by the Human Rights Committee, but an individual opinion expressed by one of its members at a meeting to consider the report of Barbados. At the time, the Committee did not adopt concluding observations.

[12] The French Somali Coast colonized by France in 1898, changed its name to the French Territory of the Afars and the Issas in 1967, and on 27 June 1977 attained independence as the Republic of Djibouti.

[13] Human Rights Committee General Comment No. 25, para. 6: "[…] Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed."

[14] Views of the Human Rights Committee, Ibrahima Gueye, 3 April 1989.

[15] Senior Advocate-General of the Court of Cassation: The prosecution department of the Court of Cassation is composed of judges with the title "advocates-general". They are called upon, in a personal capacity, to give an opinion, in complete independence and impartiality, on the circumstances of the case and the applicable rules of law, and their opinion on the solutions required, as their conscience dictates, in the case submitted for jurisdiction. The Senior Advocate-General, who heads the department, has the specific responsibility of setting forth his argument before all the divisions of the Court when they assemble in plenary session because of the scope of the question of principle on which the Court is called upon to rule.

[16] Yearbook of the Human Rights Committee, 1981-1982, vol. I, CCPR/3, 256th meeting, 24 March 1981, p. 71, para. 9.

[17] CCPR/C/SR.823, 825 and 826.

[18] CCPR/C/12/Rev.1/Add.7, 12 July 1996.

[19] General Comment No. 27 (67): para. 2 "The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement"; para. 5 "The right to move freely relates to the whole territory of a State, including all parts of federal States"; para. 8 "Freedom to leave the territory of a State may not be made dependent on … the period of time the individual chooses to stay outside the country."

[20] That is to say, 26 per cent of the population of New Caledonia: 4 per cent of European origin, 9 per cent of Wallisian and Futunian origin, 3 per cent of Polynesian origin, 4 per cent of Asian origin and 6 per cent of other origins. According to the Senior Advocate-General of the Court of Cassation, in 1996 the breakdown of the population of New Caledonia was as follows: 33 per cent Europeans, 44 per cent Melanesians, 22 per cent others.

[21] Communication No. 35/1978, Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius (para. 9.2).

[22] Communications No. 500/1992, J. Debreczeny v. The Netherlands; No. 44/1979, Alba Pietraroia on behalf of Rosario Pietraroia Zapala v. Uruguay; General Comment No. 18 relating to article 25 (fifty-seventh session, 1996), paras. 4, 10, 11 and 14.

[23] Constitutional Act (No. 98-610) of 20 July 1998, whose article 76 determined conditions for participation in the 1998 ballot. Congress is constituted by the meeting of the National Assembly and the Senate for the purposes of amending the Constitution, in accordance with article 89 of the Constitution of 4 October 1958.

[24] Organic Law (No. 99-209) of 19 March 1999, whose article 218 determines conditions for participation in ballots as from 2014.

[25] The authors stated, however, that they were unable to provide details of the number of such residents within the 7.67 per cent of voters excluded.

HH. Communication No. 946/2000, Patera v. The Czech Republic (Views adopted on 25 July 2002, seventy-fifth session)*

Submitted by:	Mr. L.P.
Alleged victim:	The author and his son
State party:	The Czech Republic
Date of communication:	17 May 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2002,

Having concluded its consideration of Communication No. 946/2000, submitted to the Human Rights Committee by Mr. L.P. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is L.P., a Czech citizen. He claims that he, and his son are victims of a violation by The Czech Republic[1] of articles 17, paragraph 1 and 2, and 2, paragraph 3, of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

An individual opinion signed by Committee members Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati is appended to this document.

The facts as submitted by the author

2.1 The author, a businessman and leading representative of the non-governmental organization "Justice for children" and one of the founding members of "Society for Family Mediation", has a son, who was born in 1989. Since the author separated from his wife and the mother of his son, Ms. R.P., in March 1991, their son has been under the exclusive care of the mother, and the author has been denied regular contact with him.

2.2 In a preliminary court decision from the Regional Court Prague West of 12 July 1993, confirmed in a further preliminary court decision of 2 October 1995, the author was granted the right to see his son every second weekend from Saturday morning until Sunday evening. However, Ms. R.P. did not comply with the decisions and has refused the author regular access ever since. Only during 1994 and 1995 was the author allowed to see his son on an irregular basis, but then under the surveillance of a family member of Ms. R.P. or armed security officers. Ms. R.P. has been repeatedly fined for her refusal to comply with the courts' decisions.

2.3 In 1994, the author initiated criminal proceedings against her for not complying with the said court decisions, in accordance with the Criminal Code No. 140/1961 Coll., paragraph 171, section 3. The case was dealt with by the Court of Okresní soud Ústí nad Labem, and had at the time of the author's submission to the Committee on 9 February 2002, not yet been decided.

2.4 Subsequently, the author brought new criminal charges against Ms. R.P. for not complying with further preliminary decisions granting the author access to his son from December 1997 to August 1998. The case was held over for two years, from 11 January 1999, until 14 February 2001, when eventually the judge withdrew from the case. The new judge dismissed the charges against Ms. R.P. However, the author alleges that this decision was not delivered to the parties in accordance with law, and it therefore did not enter into force. The author's complaint to the Constitutional Court was dismissed.

2.5 On 18 November 1993, the Kladno Regional Court convicted Ms. R.P. of three criminal acts relating to the child custody case. The decision was appealed, but shortly before the verdict of the Court of Appeal, Ms. R.P. was granted a pardon for two of the criminal acts, whereas the third remained undecided, and eventually became time-barred. On 20 November 1995, the author submitted a constitutional complaint, which was rejected on the ground that the author had not been a party to the criminal case.

2.6 In a statement of 1 June 1992, a court specialist, Dr. J.K., and Dr. J.B., explained that the author's wife suffers from a mental disorder in the development of her personality. In another statement by Dr. J.C. and Mr. H.D. of 11 May 1993, it was stated that the author's wife was damaging the interests of their son by not allowing contact between the father and the son. These statements were supported by statements from a court specialist, Mr. V.F., dated 14 May 1995 and 15 April 1997.

The complaint

3.1 The author alleges violations of his and his son's rights to protection of their family life, including his right to regular access to his son.

3.2 The author claims that the Czech authorities have refused to act upon the court decisions allowing him regular access to his son, thus violating his and his son's right to protection of their family life under article 17, and to an effective remedy under article 2, paragraph 3 of the Covenant.

The State party's submission on the admissibility and the merits of the communication

4.1 By note verbale of 28 February 2002, the State party made its submission on the admissibility and merits of the communication. It regards the communication as inadmissible for non-exhaustion of domestic remedies and for being manifestly ill-founded.

4.2 In respect of the facts, the State party explains that the divorce proceedings between the author and his wife, which commenced in 1989, are still pending. The custody of their son is therefore regulated by provisional orders. The extensive court files relating to the divorce case now amount to several thousand pages.

4.3 It states that on 22 November 1994, the author brought criminal charges against Ms. R.P. for obstructing the execution of a court decision, pursuant to the Criminal Code, Act No. 140/1961, section 171, paragraph 3.

4.4 On 16 September 1997, a hearing took place before the District Court in Usti. According to the records of this hearing, after the Prosecuting Attorney's speech, the author demanded information about his procedural rights. The judge advised him to read the Criminal Procedural Code, Act No. 141/1961, section 43. The author refused to do so, and pleaded that the judge, the prosecuting attorney, and all attorneys at the District Public Attorney's office were biased against him. He also informed the court that he had brought criminal charges against the judge. On 19 September 1997, the court decided that the judge would not be disqualified for bias. The author challenged the decision by complaining to the Regional Court in Usti nad Labern, which rejected the complaint on 23 March 2000. The next hearing of the criminal case was scheduled for 23 February 2001, but the case is still pending.

4.5 On 29 December 1994, the author again brought criminal charges against Ms. R.P. for the crime of oppression, pursuant to section 237 of the Criminal Code.

4.6 However, the police decided, on 30 June 1995, not to proceed with the case. The author's complaint about this decision was dismissed by a resolution of the Public Attorney in Ustí nad Labem pursuant to section 148, paragraph 1 (c) of the Code of Criminal Procedure, paragraph 1.

4.7 The Public Attorney initiated separate criminal charges against Ms. R.P. for obstructing the execution of a court decision pursuant to the Criminal Code, section 171, paragraph 3 at the District Court in Usti nad Labem. The hearing took place on 13 May and 17 August 1999 and both the author and his wife were heard. The trial was then postponed for the purpose of collecting additional evidence. The judge requested some Regional Court documentation, but was unable to obtain it because the file had in the meantime been sent to the High Court in connection with the author's appeal. The next hearing was also adjourned for the purpose of collecting additional evidence, after Ms. R.P.'s lawyer had requested that the evidence should include an expert opinion on their son. The case is still pending.

4.8 The Public Attorney initiated yet another criminal case against Ms. R.P., on the basis of criminal charges filed by the author. However, the investigator decided to discontinue the proceedings, on the basis of an opinion of a specialist in clinical psychology, who stated that the author's son was very firm in his views, and refuses to spend with the author the time ordered by the court.

4.9 The author complained against the investigator's decision. On 5 April 2000, the Public Attorney dismissed his complaint as unfounded, pursuant to the Code of Criminal Procedure, section 148, paragraph 1 (a).

4.10 The author sought a review of this decision, but the complaint procedure was discontinued on 6 October 2000, on the grounds of being legally unfounded.

4.11 The author has filed a total of eight constitutional complaints, seven of which have been dismissed as manifestly ill-founded. The complaints concerned alleged breaches of the right to judicial protection. In two of the constitutional complaints, he complained about being fined for orally attacking a judge. In another motion, he required that a fine should be imposed on Ms. R.P., and in yet another, he complained against a police inspector's decision not to initiate criminal proceedings. In two of the motions, the author claimed a cancellation of a Regional Court decision, and of a Constitutional Court resolution, and in another he claimed additional information for his petition. The one constitutional complaint that was not dismissed for being manifestly unfounded, was not considered by the Constitutional Court because it did not constitute a proper motion initiating Constitutional Court proceedings, but merely a complaint against the actions of the Public Attorney's Office and a request for preliminary arrangements.

4.12 In respect of the admissibility of the communication, the State party argues that the author's constitutional complaints concerned other rights than those invoked before the Committee, and therefore the communication should be declared inadmissible for non-exhaustion of domestic remedies.

4.13 Furthermore, the State party contends that the documentation provided by the author does not reveal an arbitrary or unlawful interference by the Czech authorities in terms of article 17 of the Covenant, and the communication should be declared inadmissible for being manifestly ill-founded.

4.14 With regard to the merits of the complaint, in relation to article 17, the State party reiterates that it has never arbitrarily or unlawfully interfered with the author's rights in the terms of article 17 of the Covenant, and that all actions and decisions of the courts of all instances have complied with the rules of procedure set forth by Czech law. It points out that the author's numerous petitions and motions have resulted in a significant delay in the resolution of his divorce and the question of custody of his son. According to the State party, the author has accused of bias practically all authorities involved in the resolution of his family issues, including the bringing of criminal charges against investigators, attorneys and judges, as well as against his exparents-in-law and other persons related to Ms. R.P.

4.15 In respect of the author's claim of a violation of article 2, paragraph 3 (a) and (c) of the Covenant, the State party contends that the communication falls outside the scope of this paragraph.

Comments by the author

5.1 By letter of 22 April 2002, the author responded to the State party's submission. He contends that the State party in several ways has misrepresented the facts. He states that the State party has avoided the substance of the case, which is that he for 11 years has been prevented from meeting with his son, and that the Czech authorities have neglected to protect his rights as a father, by failing to carry out appropriate investigations regarding the criminal allegations brought by him.

5.2 With respect to the State party's allegation that the author has not exhausted domestic remedies because he did not allege Covenant rights in his constitutional complaints, the author points out that he invoked the substance of the Covenant rights in maintaining that the State party does not provide him with protection from arbitrary interference with his privacy and family life, and does not enforce such protection with all available means.

5.3 Regarding the State party's contention that the author's numerous submissions to the courts have delayed the proceedings, the author argues that the State party confuses cause and effect, and that these numerous submissions are a result of the State party's toleration of Ms. R.P.'s criminal behaviour.

5.4 The author further contends that the only criminal charge he has brought against any of his son's grandparents was brought against Ms. R.P.'s mother, for limiting his parental rights and attacking him verbally and physically. He also brought charges against the grandmother's new husband, who had threatened to kill the author, and has not been sanctioned for bodily harm caused to the author on 30 October 1999.

5.5 According to the author, section 1 of the Criminal Code provides that criminal proceedings must act towards the strengthening of the rule of law, and anticipate and prevent criminal acts. He considers that this section of the law enforces an obligation on the State party to act in order to stop the violation of his custody rights and prevent continuous violations of the same. The author emphasizes that he initiated criminal proceedings against Ms. R.P., not because he believes it is necessary to imprison her, but because the procedure of taking her into custody may persuade her to discontinue her culpable refusal of his custody rights.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 As regards the admissibility criterion in article 5, paragraph 2 (b), the State party alleges that the author's constitutional complaints concerned other rights than those invoked before the Committee and that he thereby has failed to exhaust domestic remedies. While it is not clear what the exact nature of these proceedings were, the Committee notes that the proceedings regarding divorce and custody rights have continued for 13 years without a final decision.[2] While some delays in the proceedings may be attributed to the author himself, the Committee concludes that taking into account all the circumstances of the case, the application of the remedies has been unreasonably prolonged[3] for the purpose of article 5, paragraph 2 (b) of the Optional Protocol.

6.4 The Committee notes that the author in his submissions also alleged that his son's rights had been violated. However, since he does not claim that he is representing his son, the Committee finds that this part of the communication is inadmissible under article 1 of the Optional Protocol.

6.5 The Committee has taken note of the State party's argument that the communication does not reveal an arbitrary or unlawful interference by the Czech authorities in terms of article 17 of the Covenant. However, the Committee considers that the author has substantiated sufficiently, for the purpose of admissibility, that his communication raises issues under article 17 of the Covenant, by the alleged failure of the State party to protect the author's right to have access to his son. It therefore decides that the communication is admissible insofar as it raises issues under article 17, in conjunction with article 2 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the alleged violation of article 17, the Committee notes the State party's contention that there is no documentation of arbitrary or unlawful interference by the State party with the author's family, that the decisions of courts of all instances have complied with the rules of procedure set by law, and that the delay in the resolution of the divorce and custody proceedings is due to the numerous petitions submitted by the author. However, the current communication is not based only on article 17, paragraph 1, of the Covenant, but also on paragraph 2 of the said provision, according to which everyone has the right to the protection of the law against interference or attacks on one's privacy and family life.

7.3 The Committee considers that article 17 generally includes effective protection to the right of a parent to regular contact with his or her minor children. While there may be exceptional circumstances in which denying contact is required in the interests of the child and cannot be deemed unlawful or arbitrary, in the present case the domestic courts of the State party have ruled that such contact should be maintained. Consequently, the issue before the Committee is whether the State party has afforded effective protection to the author's right to meet his son in accordance with the court decisions of the State party.

7.4 Although the courts repeatedly fined the author's wife for failure to respect their preliminary orders regulating the author's access to his son, these fines were neither fully enforced nor replaced with other measures aimed at ensuring the author's rights. In these circumstances and taking into account the considerable delays at various stages of the proceedings, the Committee takes the view that the author's rights under article 17 of the Covenant, in conjunction with article 2, paragraphs 1 and 2 of the Covenant, did not receive effective protection. Consequently, the Committee is of the view that the facts before it disclose a violation of article 17, in conjunction with article 2 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which should include measures to ensure prompt implementation of the court's orders regarding contact between the author and his son. The State party is also under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991, but on 31 December 1992 the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

[2] See Case No. 514/1992, Fei v. Colombia, paragraph 8.4, Views adopted on 4 April 1995.

[3] See also Case No. 417/1990, Balaguer v. Spain, Views adopted on 15 July 1994.

APPENDIX

Individual opinion of Committee members Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati

While agreeing with the admissibility of the communication on the basis of article 5, paragraph 2, of the Optional Protocol, I am unable to share the Committee's views that the author's rights under article 17, in conjunction with article 3 of the Covenant, have been violated.

First of all, in my opinion the provision of article 1 does not guarantee an "*absolute right*" of a separated father to have access to his child, who is under the mother's custody. The Committee should recall its views on Communication No. 201/1985 (Hendriks v. The Netherlands), where the same or similar situation was considered as raising issues under article 23.

Secondly, the Committee seems to conclude that the author did not receive "*effective protection*" as provided for under articles 17 and 2 (para. 7.4). However, I consider that the State party has done what it could. Thus, in a preliminary court decision of the Regional Court Prague West of 12 July 1993, confirmed in a further preliminary court decision of 2 October 1995, the author was granted the right to see his son every second weekend. In fact, the author was allowed to see his son during 1994 and 1995, though on an irregular basis and under the surveillance of a family member of the mother or armed security officers (para. 2.2). Later, facing non-compliance with the court decision on the part of the mother, the Public Attorney initiated criminal charges against the mother (para. 4.6). In addition, the Public Attorney initiated other criminal charges against the mother on the basis of criminal charges filed by the author himself (para. 4.7). Obviously, the mother has been repeatedly fined (para. 2.2).

Thirdly, while I do not understand why the mother has tenaciously refused to allow the father to see his son, I take note of the fact that during the procedure of the other criminal charges mentioned above, a specialist in clinical psychology stated that the son was very firm in his views and refused to spend with the father the time ordered by the court (para. 4.7). Considering that the son, who was well over 10 years of age, should be able to judge on his own and that the father made no comment on this particular point, I think that the Committee should give due consideration to the son's own wish. In this connection, I like to emphasize that what matters most in the present case is "*the best interest of the child*" and that the Czech courts should have concrete materials to determine the matter, while the author has not provided the Committee with sufficient materials to reverse the courts' judgements. In any event, it has been an established jurisprudence of the Committee that it is not for the Committee but the relevant domestic courts to evaluate facts and evidence in a given case unless such evaluation suffers from impartiality or constitutes denial of justice. In the present case, no such circumstance exists.

Finally, the author contends that the State party fails to enforce protection with all available means (para. 5.3) and the Committee states that the State party is under the obligation to provide the author with an effective remedy, which should include measures to ensure prompt implementation of the court's orders regarding contact (para. 8). However, considering the specific nature of family matters in general and the particular circumstances of the present case, I must admit that judicial remedy is not omnipotent and that there are certain limits over which it could not and should not go. Therefore, it is difficult to expect that the State party could have done more than it actually did.

(Signed) Nisuke Ando

(Signed) Prafullachandra Natwarlal Bhagwati

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

II. Communication No. 965/2000, Karakurt v. Austria (Views adopted on 4 April 2002, seventy-fourth session)*

Submitted by:	Mr. Mümtaz Karakurt (represented by counsel, Dr. Ernst Eypeltauer)
Alleged victim:	The author
State party:	Austria
Date of communication:	13 December 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 2002,

Having concluded its consideration of Communication No. 965/2000, submitted to the Human Rights Committee by Mr. Mümtaz Karakurt under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 13 December 2000, is Mümtaz Karakurt, a Turkish national, born 15 June 1962. He alleges to be a victim of a breach by the Republic of Austria of article 26 of the Covenant. He is represented by counsel.

2. The State party has made two relevant reservations which affect consideration of the present case. Upon its ratification of the Covenant on 10 September 1978, the State party entered a reservation to the effect, inter alia, that: "Article 26 is understood to mean that it does

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of one individual opinion co-signed by Committee members Sir Nigel Rodley and Mr. Martin Scheinin is appended to the present document.

not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination."[1] Upon its ratification of the Optional Protocol on 10 December 1987, the State party entered a reservation to the effect that: "On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The facts as presented by the author

3.1 The author possesses (solely) Turkish citizenship, while holding an open-ended residence permit in Austria. He is an employee of the Association for the Support of Foreigners in Linz, which employs 10 persons in total. On 24 May 1994, there was an election for the Association's work-council (Betriebsrat) which has statutory rights and responsibilities to promote staff interests and to supervise compliance with work conditions. The author, who fulfilled the formal legal requirements of being over 19 years old and having been employed for over six months, and another employee, Mr. Vladimir Polak, were both elected to the two available spaces on the work-council.

3.2 On 1 July 1994, Mr. Polak applied to the Linz Regional Court for the author to be stripped of his elected position on the grounds that he had no standing to be a candidate for the work-council. On 15 September 1994, the Court granted the application, on the basis that the relevant labour law, that is s.53(1) Industrial Relations Act (Arbeitsverfassungsgesetz), limited the entitlement to stand for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author, satisfying neither criteria, was excluded from standing for the work-council.

3.3 On 15 March 1995 the Linz Court of Appeal dismissed the author's appeal and upheld the lower Court's reasoning. It also held that no violation of article 11 of the European Convention on Human Rights (ECHR) was involved, considering that the right to join trade unions had not been interfered with. On 21 April 1995, the author appealed to the Supreme Court, including a request for a constitutional reference (including in terms of the ECHR) of s.53(1) of the Act by the Constitutional Court.

3.4 On 21 December 1995, the Supreme Court discussed the author's appeal and denied the request for a constitutional reference. The Court considered that the work-council was not an "association" within the meaning of article 11 (ECHR). The work-council was not an association formed on a voluntary and private basis, but its organization and functions were determined by law and was comparable to a chamber of trade. Nor were the staff as such an independent association, as they were not a group of persons associated on a voluntary basis. As to arguments of discrimination against foreigners, the Supreme Court, referring to the State party's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination, considered the difference in treatment between Austrian nationals and foreigners to be justified both under the distinctions that the European economic treaties draw in labour matters between nationals and non-nationals, and also on account of the particular relationship between nationals and their home State. Moreover, as a foreigner's stay could be limited and subjected to administrative decision, the statutory period of membership in a work-council was potentially in conflict.

3.5 On 24 July 1996 the author applied to the European Court of Human Rights. On 14 September 1999, the Third Chamber of the Court, by a majority, found application 32441/96 manifestly ill-founded and accordingly inadmissible. The Court held that the work-council, as an elected body exercising functions of staff participation, could not be considered an "association" within article 11 (ECHR), or that the statutory provisions in question interfered with any rights under this article.

The complaint

4.1 The author contends that s.53(1) of the Act and the State party's Courts' decisions applying that provision violate his rights to equality before the law and to be free of discrimination, contained in article 26 of the Covenant. The author refers to the Committee's findings of violations of gender-specific legislation in Broeks v. Netherlands[2] and Zwaan-de Vries v. Netherlands[3] in this connection. The author contends that the distinction made in the State party's law regarding eligibility to be elected to a work-council as between Austrian/EEA nationals and other nationals has no rational or objective foundation.

4.2 The author contends that where an employee receives the trust, in the form of the vote, of fellow employees to represent their interests upon the work-council, that choice should not be denied by law simply on the basis of citizenship. It is argued that there can be no justification for the law's assumption that an Austrian/EEA national can better represent employee's interests. Nor, according to the author, does the law limit the exclusion of non-nationals to, for instance, those who do not have a valid residence period for the term of office or are not fluent in the German language, and so the exclusion is overbroad. It is contended that the reservation of the State party to article 26 of the Covenant should not be interpreted as legitimising any unequal treatment between nationals and non-nationals.

4.3 As to issues of admissibility, the author concedes the State party's reservation to article 5 of the Optional Protocol, but argues that the Committee's competence to consider this communication is not excluded as the European Court only considered the "association" issue under article 11 (ECHR) and did not examine issues of discrimination and equality before the law. The author points out that article 26 of the Covenant finds no equivalent in the European Convention, and so the communication should be held admissible.

The State party's observations on admissibility and merits

5.1 The State party, by submissions of 31 July 2001 and 14 March 2002, contests both the admissibility and the merits of the communication.

5.2 As to admissibility, the State party argues that the European Court of Human Rights has already considered the same matter, and that accordingly, by virtue of the State party's reservation to article 5 of the Optional Protocol, the Committee is precluded from examining the communication.

5.3 As to the merits, the State party advances three arguments as to why there is no violation of the Covenant. Firstly, the State party argues that the claim, properly conceived, is a claim under article 26 in conjunction with article 25, as the right to be elected to work-councils is a political right to conduct public affairs under article 25. Article 25, however, as confirmed in the Committee's General Comment 18, explicitly acknowledges the right of States parties to differentiate on the grounds of citizenship in recognizing this right. Accordingly, the Covenant does not prevent the State party from granting only its citizens the right to participate in the conduct of political affairs, and for this reason alone the claims must fail.

5.4 Secondly, the State party submits that the Committee is precluded by its reservation to article 26 of the Covenant from considering the communication. The State party argues that it has excluded any obligation to treat equally nationals and non-nationals, thereby harmonizing its obligations under the Covenant with those it has assumed under the International Covenant on the Elimination of All Forms of Racial Discrimination (see article 1, paragraph 2). Accordingly, it has assumed no obligation under article 26 to confer the treatment accorded nationals also to foreigners, and the author has no right under article 26 to be treated in the same way as Austrian nationals in respect of eligibility to stand for election to the work-council.

5.5 Thirdly, the State party submits that, if the Committee reaches an assessment of whether the difference in treatment between the author and Austrian/EEA nationals is justified, the differentiation is based on reasonable and objective grounds. The State party argues that the privilege accorded EEA nationals is the result of an international law obligation entered into by the State party on the basis of reciprocity, and pursues the legitimate aim of abolishing differences in treatment of workers within European Community/EEA member States. The State party refers to the jurisprudence of the Committee[4] for the proposition that a privileged position of members of certain States created by an agreement of international law is permissible from the perspective of article 26. The Committee observed that creating distinguishable categories of privileged persons on the basis of reciprocity operated on a reasonable and objective basis.

5.6 The State party refers to the decision of its Supreme Court of 21 December 1995, which, relying on the jurisprudence of the European Court of Human Rights on the justification for treating Community nationals preferentially, held that the European Accession Treaty constituted an objective justification for different legal status of Austrian/EEA nationals and nationals of third countries.

5.7 The State party points out in conclusion that the issue of whether, as a matter of directly applicable European law, Turkish employees have the right to stand for election to work-councils, is a matter currently being litigated before the European Court of Justice.[5] It emphasizes however that even if the outcome is that there is such a right, which would satisfy the object of the author's current complaint, the distinction in the current law between Austrian/EEA nationals and others remains objectively justified and accordingly consistent with article 26.

The author's comments on the State party's submissions

6.1 The author, by submissions of 19 September 2001, rejects the State party's arguments on both admissibility and merits.

6.2 As to admissibility, the author emphasizes that the claim brought before the European Court related to the right of association protected in article 11 of the European Convention on Human Rights, while the claim now brought is one of discrimination and equality before the law under article 26 of the Covenant. Accordingly, the author, referring generally to the Committee's jurisprudence, claims that it is not the "same matter" now before the Committee as has already been before the European Court. In any event, the author argues that a rejection of the communication as manifestly ill-founded cannot be considered an "examination" of the matter, within the meaning of the State party's reservation.

6.3 As to the merits, the author argues that article 25 has no relevance to this case, concerning public matters rather than issues of organizational employment structures in the private sector. As the work-council concerns central representation of the employees of a private sector organization, there is no public dimension which would attract article 25 and the claim falls to be considered alone by the general principles of article 26.

6.4 The author repeats his contention that article 26 imposes a general obligation on the State party to avoid legal and practical discrimination in its law, and argues that no reasonable and objective grounds for the differentiation exist. A reasonable differentiation would, rather than imposing a blanket prohibition on non-Austrian/EEA nationals, permit such nationals possessing, like the author, sufficient linguistic and legal capacities the right to stand for work-council election. The mere existence of the European association provision and the current proceedings before the European Court of Justice are said to underscore the problematic nature of the current blanket differentiation in this employment field between Austrian/EEA nationals and other nationals performing the same labour tasks.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 As required under article 5, paragraph 2 (b), of the Optional Protocol, the Committee has ascertained that domestic remedies have been exhausted.

7.4 As to the State party's contention that its reservation to article 5 of the Optional Protocol excludes the Committee's competence to consider the communication, the Committee notes that the concept of the "same matter" within the meaning of article 5 (2)(a) of the Optional Protocol must be understood as referring to one and the same claim of the violation of a particular right concerning the same individual. In this case, the author is advancing free-standing claims of discrimination and equality before the law, which were not, and indeed could not have been, made before the European organs. Accordingly, the Committee does not consider itself precluded by the State party's reservation to the Optional Protocol from considering the communication.

7.5 The Committee has taken note of the State party's reservation to article 26, according to which the State party understood this provision "to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination". The Committee considers itself precluded, as a consequence, from examining the communication insofar as it argues an unjustified distinction in the State party's law between Austrian nationals and the author. However, the Committee is not precluded from examining the claim relating to the further distinction made in the State party's law between aliens being EEA nationals and the author as another alien. In this respect the Committee finds the communication admissible and proceeds without delay to the examination of the merits.

Examination of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.2 As to the State party's argument that the claim is, in truth, one under article 25 of the Covenant, the Committee observes that the rights protected by that article are to participation in the public political life of the nation, and do not cover private employment matters such as the election of an employee to a private company's work-council. It accordingly finds article 25, and any adverse consequences possibly flowing for the author from it, not applicable to the facts of the present case.

8.3 In assessing the differentiation in the light of article 26, the Committee recalls its constant jurisprudence that not all distinctions made by a State party's law are inconsistent with this provision, if they are justified on reasonable and objective grounds.[6]

8.4 In the present case, the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. Although the Committee had found in one case (No. 658/1995, Van Oord v. The Netherlands) that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be drawn therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a work-council, i.e., to promote staff interests and to supervise compliance with work conditions (see paragraphs 3.1). In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work-council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, consisting of modifying the applicable law so that no improper differentiation is made between persons in the author's situation and EEA nationals.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive, within 90 days, information from the State party about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Article 1, paragraph 2, of the Convention provides as follows: "2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens."

[2] Communication No. 172/1984.

[3] Communication No. 182/1984.

[4] Van Oord v. The Netherlands, Communication No. 658/1995.

[5] The litigation revolves around the interpretation of article 10, paragraph 1, of Association Council Decision No. 1/80, which requires Community member States to grant Turkish employees belonging to their regular labour market a status vis-à-vis Community workers, excluding discrimination on the grounds of nationality, with regard to remuneration and "other working conditions". The Federal Ministry for Labour, Health and Social Affairs took the view, on its interpretation of the relevant jurisprudence of the European Court of Justice, that the article was directly enforceable, and that the right to stand for work-council election was an "other working condition". That interpretation favourable to persons in the author's situation was challenged in the Constitutional Court, which has now referred the matter to the European Court of Justice for decision.

[6] See, for example, Broeks v. The Netherlands (Communication No. 172/1984), Sprenger v. The Netherlands (Communication No. 395/1990) and Kavanagh v. Ireland (Communication No. 819/1998).

APPENDIX

Individual opinion of Committee members Sir Nigel Rodley and Mr. Martin Scheinin (partly dissenting)

We share the Committee's views that there was a violation of article 26 of the Covenant. However, we take the position that the State party's reservation under that provision should not be understood to preclude the Committee's competence to examine the issue whether the distinction between Austrian nationals and aliens is contrary to article 26.

Both the wording of the reservation and the State party's submission in the present case refer to Austria's intention to harmonize its obligations under the Covenant with those it has undertaken pursuant to the Convention for the Elimination of All Forms of Racial Discrimination (CERD). Hence, the effect of the reservation, interpreted according to the ordinary meaning of its terms, is that the Committee is precluded from assessing whether a distinction made between Austrian nationals and aliens amounts to such discrimination on grounds of "race, colour, descent or national or ethnic origin"[1] that is incompatible with article 26 of the Covenant.

However, in its practice the Committee has not addressed distinctions based on citizenship from the perspective of race, colour, ethnicity or similar notions but as a self-standing issue under article 26.[2] In our view distinctions based on citizenship fall under the notion of "other status" in article 26 and not under any of the grounds of discrimination covered by article 1, paragraph 1, of the CERD.

Consequently, the Austrian reservation to article 26 does not affect the Committee's competence to examine whether a distinction made between citizens and aliens amounts to prohibited discrimination under article 26 of the Covenant on other grounds than those covered also by the CERD. Consequently, the Committee is not prevented from assessing whether a distinction based on citizenship is per se incompatible with article 26 in the current case.

For us, therefore, the issue before the Committee is that of the compatibility with its obligations under article 26 of the State party's legislation as applied in the present case preventing an alien from standing for elective office in a work-council. Nothing in the State party's response persuades us that the restriction is either reasonable or objective. Therein lies the State party's violation of article 26 of the Covenant.

(Signed) Nigel Rodley

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The terms used in article 1, paragraph 1, of the CERD. Article 1, paragraph 2, of the CERD makes it clear that citizenship is not covered by the notion of "national origin".

[2] Ibrahima Gueye and 742 other retired Senealese members of the French army v. France (Communication No. 196/1985).

3.2 Counsel explains that Regional Social Security Boards are public law institutions and that the Regulation is a legislative decree (Verordnung) regulating almost all employment related matters of the Board, inter alia the amount of retirement benefits and their calculation, including increase or periodical adjustment. Counsel submits that many similarities exist between occupational pension schemes (Betriebsrenten) offered by private employers and the scheme based on the Regulation. However, the Regulation can be changed, unilaterally, by legislative decree of the State party.

3.3 Counsel emphasizes that the pension scheme in question is not at all related to the general pension scheme as part of the social security system under the General Social Security Law, but only applicable to employees of the Regional Social Security Boards. Counsel explains that under the General Social Security Law every employee in Austria contributes to the public pension fund a fixed percentage of his income, up to a maximum amount of calculation (Höchstbeitragsgrundlage). The amount paid under this scheme is adjusted by an annual multiplier taking into account inflation, interest rates, household expenses etc. This scheme is meant to provide the general basic insurance coverage for retirement.

3.4 The scheme under the Regulation is a separate system of additional insurance. Employees contribute a certain percentage of their total income, i.e. including the amount exceeding the maximum amount of calculation. The scheme is employment related and, therefore, based upon an essentially contractual relationship between employees and the Board. Counsel states that the two pension schemes have not much in common as they have different purposes, are calculated differently, reach different groups of people, and are based on different ideas. Therefore, the decision to adjust the benefits to which the authors are entitled by the Regulation by applying the criteria of the General Social Security Law violates the principle of equality, as two entirely different factual patterns are treated equally.

3.5 Counsel further argues that, although their pension scheme is similar to private occupational pension schemes, the latter are not interfered with, thus constituting a separate violation of the right to equality.

3.6 Moreover, counsel argues that if a private employer would interfere with the pension scheme by modifying the calculation of adjustments, employees would have a remedy available for breach of contract. However, in the case of the authors, as the Regulation is a legislative decree and their employer a semi-public entity, no remedy exists. Only in case of a breach of the constitution could the courts intervene. According to counsel, this is a further violation of the authors' right to equality.

3.7 Counsel refers to the earlier Communication No. 608/1995, Franz Nahlik v Austria, regarding a previous amendment to the Regulation that the Committee declared inadmissible on 22 July 1996, and warn of the cumulative effect of step-by-step interference.

The State party's observations

4.1 In submissions of 22 July 1998, 2 June, and 23 August 1999, the State party argues that the Regulations of Service for Employees of the Social Insurance Board, as far as it regulates the relationship of the Insurance Boards and its retired employees, is not a decree, but a collective agreement. As a collective agreement, the Regulation is concluded between the Association of Social Insurance Institutions and the trade union, the latter representing the interests of private employees. The State party claims that there is no possibility of interference in the decision-making process, and that accordingly the State party cannot be held responsible for a possible breach of article 26 of the Covenant that results from the collective agreement.

4.2 The State party explains that the General Social Security Law provides for individual contracts on conditions for employment, income and pension. The scope of individual contracts is limited by the collective agreements, which may regulate, inter alia, changes in the pensions of former employees. The parties to collective agreements are only limited by legal prohibitions and public policy, when changing provisions of collective agreements. As far as the collective agreements do not regulate the scope of individual contracts, their provisions are legally binding on those concerned, including former employees. This part of collective agreements is a source sui generis of private law.

4.3 The State party submits that a decision of the European Court would have examined the same issues and facts under, mainly, the same legal aspects.

4.4 The State party argues further that the amendment of the Regulation does not have negative consequences on the authors. While the amendment may lead to a situation where the authors' pensions rise less than the income of active employees, the State party refutes an excessive reduction of their pension as a result of the amendment. The State party submits that between 1975 and 1995 in nine years, at least, the pension adjustment factor under the General Insurance Law was, in fact, higher than the rise of the salaries of employees of the Board.

4.5 The State party claims that it can only be held responsible for violations of the Covenant that have occurred and not for future events. At the moment, no significant gap between the development of the salaries of active employees of the Board and the calculation of pensions could be established.

4.6 Furthermore, the State party claims that there is an objective reason for the different development of the salaries of active employees and pensions, since retired employees do not have to contribute to unemployment or pension insurance, and their health insurance contributions are reduced. The State party refutes that the former employees of the board are treated differently than former employees receiving pensions under an occupational pension scheme since both are guided by the same basic rules leaving a margin of appreciation when regulating the details of the schemes.

Authors' comments

5.1 Counsel requests the Committee to reject the State party's submission of 2 June and 23 August 1999, because the deadline fixed by the Committee had expired.

5.2 Counsel claims that even though the application to the European Commission of Human Rights concern the same persons and facts, they raise entirely different issues. The present case claims rights that are exclusively protected by either the Covenant (right to substantive equality) or by the European Convention (right to property). No case law exists that would support that the European Court of Human Rights would deliberately extend its investigation into issues excluded from the application.

5.3 Counsel submits that the authors do not claim discrimination in the adverse effect of the amended Regulation, but in its application. Therefore, the monetary disadvantage as a result of the discrimination is not relevant. Counsel submits tables on the overall effect of the amendments to the Regulation on the pension from 1994 to 1999 of one of the authors. It appears from these calculations that the difference caused by the amended Regulation in the Regulation-based part of the monthly pension benefits was 0.17 per cent in 1994 and gradually developed to 3.5 per cent in 1999. The latter figure corresponds to a 2.1 per cent lower level in the resulting overall pension in 1999, compared to how the benefits would have developed without the amendment. After the amendment, there was a 8.2 per cent rise in overall pension benefits between 1994 and 1999.

5.4 Counsel claims that the reasons for the amendments submitted by the State party were not the reasons considered by the partners of the collective agreement. Furthermore, counsel argues that the different burden of contributions of active employees and pensioners is already reflected in that pensioners receive only 80 per cent of their last salary.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2. The Committee notes that according to the author the multiplier effect is now applied both to payments from the public pension fund and to the additional pension from the Social Insurance Board. The authors have failed to demonstrate that the change brought about in the computation of their pension rights is discriminatory or otherwise possibly falls within the ambit of article 26 of the Covenant. The authors, therefore, have failed to substantiate, for the purposes of admissibility, a claim under article 26 of the Covenant.

6.3 In light of the conclusion reached above, the Committee need not address the issue whether the reservation by the State party to article 5, paragraph 2, of the Optional Protocol precludes the examination of the communication by the Committee due to being the same matter that the European Court of Human Rights declared inadmissible on 12 January 2001.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Application No. 34314/96.

[2] The reasoning reads, in its relevant part, as follows: "Insofar as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of rights and freedoms set out in the Convention or its Protocols."

APPENDIX

Individual opinion of Committee member Mr. Eckart Klein

According to my view the Committee should have examined the issue whether the reservation declared by the State party precludes the consideration of the communication by the Committee (see paragraphs 4.3, 6.3) before addressing the question of substantiation of the claim under article 2 of the Optional Protocol (para. 6.2). The reason is that the reservation, if applicable, excludes the competence of the Committee to consider the communication. Only such consideration would open the way to assess the issue of substantiation, be it for purposes of admissibility or merits.

(Signed) Eckart Klein

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

B. Communication No. 825/1999, Silva v. Zambia
Communication No. 826/1999, Godwin v. Zambia
Communication No. 827/1999, de Silva v. Zambia
Communication No. 828/1999, Perera v. Zambia
(Decision adopted on 25 July 2002, seventy-fifth session)*

Submitted by:	Welvidanelage Don Hugh Joseph Francis Silva (825/1998), Don Clarence Godwin (826/1998), Sunil Randombage de Silva (827/1998), T.J.A. Perera (828/1998)
Alleged victim:	The authors
State party:	Zambia
Date of communication:	28 October 1997 (825/1998), 27 November 1997 (826/1998), 28 October 1997 (827/1998), 25 October 1997 (828/1998) - (initial submissions)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2002,

Adopts the following:

Decision on admissibility

1. The authors of the communications are Mr. Welvidanelage Don Hugh Joseph Francis Silva, Don Clarence Godwin, Sunil Randombage de Silva and T.J.A. Perera, citizens of Sri Lanka. They claim to be victims of a violation by Zambia of articles 8, paragraph 3 (a) of the International Covenant on Civil and Political Rights (the Covenant). They are not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The four cases have been joined in one draft because they are related to a similar claim at a similar moment and against the same State party.

The facts as submitted by the authors

2.1 The authors, attorneys at law, state that, between 21 August and 3 September 1991, they were offered each a position as assistant legal aid counsel to the governmental services of the Republic of Zambia. The offer included a salary in local currency and an inducement allowance of an amount varying between US$ 4,260 and 7,080 per annum, paid in Sri Lanka on a monthly basis. Travel to and from Zambia was to be paid by the Zambian Government, provided that the authors did at least 24 months of service.

2.2 The authors accepted the offer of appointment and travelled to Zambia. Mr. Silva assumed his duties from 1 July 1992, Mr. Godwin and Mr. de Silva from 6 May 1992 and Mr. Perera from 8 April 1992.

2.3 The authors claim that there were undue delays in the payment of the inducement allowance[1] and that, from 1 April 1993, between nine months and a year after they assumed duties in Zambia, a tax amounting to 35 per cent was deducted from the allowance. The authors contend that the tax deduction constitutes a gross violation of the agreement between them and the Government of Zambia. They thus requested the Government either to reimburse the amount of the tax or to terminate their contract and arrange for a return to Sri Lanka.

2.4 According to the authors, the Government did not respond to their request. As a result, and because of lack of money, the authors did not have the possibility to return to Sri Lanka before they had completed 24 months, as it was provided in their contract. The authors were thus forced to work under conditions to which they had never agreed. All of them resigned between April and December 1994 and returned to Sri Lanka.

2.5 With regard to the exhaustion of domestic remedies, the authors refer to an attempt made by Mr. de Silva on 4 August 1994 to seek relief in the High Court of Zambia in Lusaka. In the latter case, the High Court advised the parties to settle the matter amicably, but it is submitted that the Government of Zambia did not offer any relief to Mr. de Silva or to the other authors. Moreover, the authors submit that, before they had a chance to pursue further remedies, they invoked the contractual clause to terminate their appointment and to be provided with return travel to Sri Lanka.

The complaint

3.1 The authors submit that because of the deduction of 35 per cent tax on their inducement allowance, they were not able to return to Sri Lanka before they had served 24 months, the conditions to be provided with return travel to Sri Lanka. It is argued that if the State party had wished to change the terms of the contract, they could have terminated the first contract with the possibility to return to Sri Lanka and could have made propositions for a new contract. Nevertheless, the Government did not make such an offer because it allegedly needed the authors' services. This would allegedly amount to forced labour and constitutes therefore a violation of article 8, paragraph 3 (a) of the Covenant.

3.2 In addition to the reimbursement of the tax on the inducement allowance, Mr. Perera asks to be paid the amount of the inducement allowance for the third year of contract, which he could not finish as he was forced to leave Zambia, and the gratuity according to the contract.

The State party's observations on the admissibility and merits of the communication

4.1 By note verbale of 26 April 2000 and 26 March 2001, the State party made its submission on the admissibility and merits of the communications.

4.2 On the admissibility, the State party argued that the authors of the communications have not exhausted domestic remedies. The State party submits that even though Mr. de Silva was advised by the High Court to settle the matter amicably with the Government, this would not have prejudiced the outcome of any ensuing judicial proceedings and an appeal could have been made to the State party's Supreme Court. The State party also notes that the authors freely decided to invoke the clause in their contract that gave them the right to be provided with a return travel to Sri Lanka, which rendered difficult to pursue domestic remedies and therefore exonerates the State party's Government.

4.3 Furthermore, the issues raised by the authors could have been dealt with appropriately at the ministerial level since, on several occasions, they were informed of government procedures, which they used for reassessment of salaries, travel for families and quarters.

4.4 On the merits, the State party submits that in the years 1990-1991, the Zambian Government recruited some Sri Lankan nationals to work in the Ministry of Legal Affairs due to a shortage of qualified lawyers under government employment.

4.5 The State party notes that an addendum to the initial contract of the authors was signed in June 1992, modifying slightly its terms, as a consequence of new exchange rate regimes issued by the Bank of Zambia. This addendum was duly signed by the authors. The State party also explains that the reasons for making the addendum was that, at the time, the Government sought to control the flow and circulation of foreign exchange within the country due to limited financial resources available. As a result, foreign exchange was not always available, which had unfortunate consequences on the regularity of the payment of inducement allowances. The State party finally notes that, according to the addendum, although the local salary began to attract a higher tax rate, the inducement allowance as well as the gratuity were in this regard not affected as they remained tax free.

4.6 Concerning the delays in the payment of the inducement allowance, the State party considers that this constituted an unforeseen circumstance at the time of recruitment, but reiterates that, according to its record, the totality of the allowances have been acquitted.

4.7 Concerning the gratuity provided for under the contract of appointment, the State party emphasized that the condition for obtaining such a gratuity was the completion of 30 months satisfactory resident service.

4.8 Concerning housing,[2] the State party explains that, under the contract, government quarters may be provided for when available and that in such cases, a rental contribution, which varies from one employee to another according to the salary scale, would be deducted from the salary.

4.9 Concerning employment permits, the State party underlines that they are issued in accordance with provisions under the Immigration Act and vary in their periods of validity.

4.10 The State party draws also the attention of the Committee to the fact that one month prior to commencement of duties, the authors requested reassessment of salaries which would vary their terms of engagement and necessitate a promotion by one grade. The Zambian Government eventually granted these reassessments although the conditions were not met. In addition, the authors have requested payment of expenses of private nature, such as telephone calls, taxi fares, extra food and beverages, all of which were accepted by the Zambian Government.

4.11 The State party contests the authors' allegations that their resignation prevented them from pursuing domestic remedies. It notes that the authors' working permit was not an obstacle in this regard and that they would have had ample time to resolve the matter amicably. The State party also disputes the authors' allegations that because their remuneration was unilaterally reduced they could not finance their stay in Zambia and continue litigation with an unwilling and hostile Government.

4.12 Finally, the State party wishes to clarify that, contrary to what was submitted by the authors, only the local salary was affected by the higher tax rate and this had been made clear in the addendum that the authors duly signed.

Comments of the author

5.1 By letter of 16 and 28 July 2001, the authors responded to the State party's submissions.

5.2 With regard to the exhaustion of domestic remedies, the authors argue that the High Court advised to settle the matter amicably because it did not want to embarrass the Government but that no action was taken by the Government to remedy the situation. As a consequence, since there was no final decision from the High Court, the authors were prevented from appealing to the Supreme Court. Moreover, it was only at a time close to their departure to Sri Lanka that the authors were informed that no amicable settlement could be reached, which did not leave them much time for pursuing other remedies. The authors therefore consider that they have made reasonable efforts to exhaust domestic remedies.

5.3 With regard to their contractual situation, the authors stress that they have no issue with regard to the taxation of local salary but maintains that a 35 per cent tax was deducted from their inducement allowance and ask that this amount be reimbursed to them. They refer in this regard to a letter from the Attorney-General of 31 October 1994, contradicting the State party's observations of 26 March 2001, where it is stated that they are not "entitled to be paid inducement allowance […] without deduction of tax" and that they "are entitled to be paid inducement allowance […] after deduction of income tax".

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee considers that, for the purpose of article 2 of the Optional Protocol, the authors have not sufficiently substantiated, for purpose of admissibility, how the taxation of their inducement allowance could be seen as constituting forced labour under article 8 paragraph 3 (a) of the Covenant.

6.4 In the light of the conclusion reached above, the Committee does not need to address the issue of exhaustion of domestic remedies under article 5, paragraph 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communications are inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the authors and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Mr. Perera alleges that he received the first inducement allowance for April 1992 in April 1993.

[2] None of the authors are making a specific claim with regard to housing.

C. Communication No. 880/1999, Irving v. Australia (Decision adopted on 1 April 2002, seventy-fourth session)*

Submitted by:	Mr. Terry Irving (represented by counsel, Mr. Michael O'Keeffe)
Alleged victim:	The author
State party:	Australia
Date of communication:	5 October 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2002,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 5 October 1999, is Terry Irving, an Australian national, born in 1955. The author claims to be the victim of a violation by Australia of article 14, paragraph 6, of the International Covenant on Civil and Political Rights. He is represented by counsel. The author's initial claim under article 9, paragraph 5, of the Covenant was abandoned by submission of counsel dated 29 May 2001.

1.2 Upon ratification of the Covenant, Australia entered a reservation to article 14, paragraph 6, of the Covenant to the effect that "the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision".

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Under rule 84 (a) of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the present communication.

A dissenting opinion co-signed by Committee members Mr. Louis Henkin and Mr. Martin Scheinin is appended.

The facts as presented by the author

2.1 On 8 December 1993, a jury in the District Court of Cairns convicted the author of an armed robbery of a branch office of the ANZ bank in Cairns, committed on 19 March 1993; he was sentenced to eight years of imprisonment. He applied for legal aid to appeal the decision, but Legal Aid Queensland turned down his request. He appeared without legal representation before the Queensland Court of Appeal, which dismissed the appeal on 20 April 1994.

2.2 On 3 May 1994, the author applied for legal aid to fund an application for special leave to appeal to the High Court of Australia. On 28 May 1994, the Queensland Legal Aid Office refused the application. In July 1994, the author further applied to the Legal Aid Review Committee for review of that decision. In August 1994, the District Committee once more refused legal aid. The author then unsuccessfully pursued appeals to other bodies, including the Queensland Criminal Justice Commission, the Queensland Law Society and the Queensland Ombudsman.

2.3 The author applied again to the Legal Aid Review Committee, seeking legal aid for an application for special leave to appeal. In January 1995, the Committee granted legal aid to refer the matter to counsel for advice on the prospects of an appeal. In April 1995, the author was refused further legal aid. On 17 July 1995, the Queensland Prisoners Legal Service refused the author's request for assistance. On 28 August 1995, the ACT Legal Aid Office refused the author's application for legal aid.

2.4 In August 1995, the author was served with documents naming him as the respondent in compensation proceedings instituted by the three bank tellers of the ANZ bank he denies robbing. On 22 September 1995, appearing in these proceedings, the author stated that he was wrongly convicted of the offence. On 24 November 1995, he was refused permission to adduce further identification evidence in the same proceedings, and an order of compensation was made.

2.5 After exhausting all possible avenues of representation and assistance known to him, the author considered that he had no alternative but to represent himself in the High Court of Australia, notwithstanding his previous failure as a self-represented applicant in the Queensland Court of Appeal. On 2 May 1996, the High Court accepted the documentation compiled by the author in custody as an application for special leave to appeal. On 8 December 1997, four years to the day from his original conviction, the High Court at once granted the author's application for special leave to appeal, allowed the appeal, quashed the conviction and ordered a retrial. The Court accepted the Crown's concession at the hearing that the author's original trial had been unfair. The Court observed that it had "the gravest misgivings about the circumstances of this case", that "it is a very disturbing situation" and that "in all of this, the accused has been denied legal aid for his appeal". On 11 December 1997, the author was released from prison on bail. On 2 October 1998, the Director of Public Prosecutions of Queensland indicated that the author would not be re-tried, and entered a nolle prosequi.

2.6 On 6 July 1998, the author applied to the Queensland Attorney-General, seeking ex gratia compensation for a miscarriage of justice occasioned by his wrongful imprisonment that lasted for over four and half years. He also requested the establishment of an independent Commission of Inquiry into the circumstances of his wrongful conviction and imprisonment. On 10 August 1998, 18 September 1998 and 21 December 1998, the author again applied to the Queensland Attorney-General.

2.7 On 11 January 1999, the Queensland Department of Justice referred allegations of official misconduct in the case to the Queensland Criminal Justice Commission. On 19 March 1999, the author initiated an action in the Queensland Supreme Court against the investigating officer and the State of Queensland, seeking damages for malicious prosecution and exemplary damages.

2.8 On 25 July 1999, the author again sought compensation from the Queensland Attorney-General. In August 1999, the Criminal Justice Commission replied that the author's matter was not one giving rise to a reasonable suspicion of official misconduct. The author thereupon again sought compensation from the Attorney-General. In September 1999, the Attorney-General's senior policy adviser informed the author that "[I]n view of the advice from the Criminal Justice Commission and of your decision to initiate legal action, the Attorney-General will not further consider your application for an ex-gratia payment of compensation, but will await the outcome of your legal action". On 15 August 2000, the author complained to the Queensland Parliamentary Criminal Justice Committee. By early February 2002, no response to his complaint had been forthcoming from the Parliamentary Committee, and the matter was said to be still under investigation.

The complaint

3.1 The author contends that he has exhausted all available and effective domestic remedies, and that he has unsuccessfully made all reasonable efforts to obtain the payment of compensation for wrongful imprisonment from the Queensland Attorney-General, as required under article 5, paragraph 2 (b), of the Optional Protocol.

3.2 The author contends that he fulfils all the conditions to obtain compensation under the terms of article 14, paragraph 6. Firstly, he was convicted of a criminal offence on 8 December 1993. Secondly, his conviction was subsequently reversed by the High Court of Australia on 8 December 1997. Thirdly, the decision of the High Court was a final one. Fourthly, the author submits that the conviction has been reversed on the ground that a new or newly discovered fact showed conclusively that there had been a miscarriage of justice, in particular the facts that he had not had a fair trial and that the Court had the gravest misgivings about the circumstances of the case. Finally, the author states that it has not been proved that the non-disclosure of the unknown fact in issue is wholly or partly attributable to him. As all the elements necessary for compensation under article 14, paragraph 6, have been met, the State of Queensland should have paid him compensation. Article 14, paragraph 6, was violated since this was not done.

State party's submissions on admissibility and merits

4.1 On the admissibility of the communication, the State party, by submission of 22 October 2000, observes that:

- The author failed to exhaust available and effective domestic remedies. At the time of submission of the communication, he was pursuing two different actions, one for malicious prosecution and exemplary damages against the investigating detective and the State of Queensland, the other one seeking compensation for wrongful imprisonment from the Attorney-General of Queensland. The two procedures, according to the State party, are under active consideration, and thus said to be effective. There are no special circumstances which would absolve the author from exhausting these remedies. The State party submits that final determination of the complaints would, assuming diligent pursuit, take 12 to 18 months - it denies that Mr. Irving's pursuit of relief is being unreasonably delayed by the Queensland courts.

- The author failed to show a violation of article 14, paragraph 6, as the final decision in his case, i.e. that of the High Court of Australia, did not constitute, nor affirm, the initial conviction. Since, for the purposes of article 14, paragraph 6, of the Covenant, the final decision must confirm the conviction, and in the instant case the judgement of the High Court had exactly the opposite effect, article 14, paragraph 6, is inapplicable in the circumstances of the case, and this claim should be declared inadmissible ratione materiae.

4.2 As far as the merits of the author's claims are concerned, the State party submits that:

- Article 14, paragraph 6, of the Covenant, was not violated because the author was not convicted by a "final decision", within the meaning of this provision. The State party recalls that a "final decision" is one that is no longer subject to appeal. The author's conviction was always subject to appeal under the mechanisms of the Australian judicial review system. In Australia generally, and in Queensland specifically, a decision of a trial court convicting a person is not, at least initially, a final decision, since the convicted person always has a right of appeal against the conviction. The State party notes that the fact that the author successfully appealed to the High Court counters any argument that the decision of the Supreme Court of Queensland was a final one.

The author's comments on the State party's submission

5.1 As far as the admissibility of his communication is concerned, the author contends that:

- The tort remedies which he has initiated cannot be considered to constitute available remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, as they are not effective. Moreover, the mere possibility of ex-gratia payments for

> wrongful imprisonment in the event of the dismissal of his claims also cannot be said to constitute a remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, because it depends on the exercise of the discretion of the State party's authorities. Finally, Mr. Irving submits that the application of remedies has been "unreasonably prolonged" by the judicial authorities of Queensland.

5.2 As an alternative to his initial argument relating to article 14 (6), Mr. Irving now argues that the High Court's decision did not constitute a "final decision" in the sense of this provision, but the reversal of his conviction. He notes that the grant of special leave to appeal to the High Court is entirely discretionary and is obtained only if the High Court considers that an application relates to a question of law or is of public importance. As there is no mandatory right of appeal to the High Court, the author contends that he was convicted by the "final decision" of the Queensland Court of Appeal. He further contends that his appeal to the High Court could not be considered a normal appeal, because his conviction was quashed by the High Court following an application for special leave to appeal that was lodged two years after the expiry of the time within which such an application should normally be lodged. He was unable to lodge this appeal within normal deadlines because of the State party's refusal to grant legal aid. Thus, in the special circumstances of the case, it was the decision of the Court of Appeal of Queensland, which affirmed his conviction, was "final" within the meaning of article 14, paragraph 6.

Further submissions by the State party on admissibility and merits

6.1 As far as admissibility is concerned, the State party contends that the delays complained of by the author, in relation to progress of the two actions for malicious prosecution and for compensation for wrongful imprisonment, are primarily attributable to him, not to the State party. Furthermore, any delay of the Queensland Parliamentary Criminal Justice Committee in replying to the author cannot be attributed to the State party, as this parliamentary committee is not subject to the direction of the Queensland executive.

6.2 On the merits, the State party reiterates that there was no conviction by a "final decision", as required by article 14, paragraph 6, in the author's case. It contends that the fact that the High Court has discretion to refuse special leave to appeal from judgements of the Queensland Court of Appeal does not negate the normalcy of the appeal procedure, as a right to appeal is often subject to conditions relating to timing or standing: "the special leave requirement for appeals to the High Court is an ordinary part of the method adopted to give effect to the right of appeal guaranteed in the Australian Constitution".

6.3 Nor does the existence of statutory deadlines for the filing of special leave to appeal applications lead to a different conclusion: a failure to file an application within the normal 28 day period is not determinative of whether the High Court will hear the application. There are frequent delays with special leave applications, especially where legal aid is involved, and the High Court often grants extensions of time in which to file such applications. The State party therefore challenges the author's alternative argument that the judgement of the Court of Appeal of April 1994 constituted the "final decision" for the purposes of article 14, paragraph 6, of the Covenant.

Counsel's final submission

7.1 By supplementary submission of 5 February 2002, counsel emphasizes that the two actions against the arresting officer and the State of Queensland (March 1999) and against the Attorney-General of Queensland (December 1999) were initiated only after Queensland's refusal to honour its obligations under article 14, paragraph 6; furthermore, Queensland insists that it will not negotiate any settlement of the matter and that the author's actions be litigated, including conclusion of all possible appeals. Finally, the pursuit of domestic remedies must be considered to be "unreasonably prolonged", not only by virtue of the fact that more than seven years have already elapsed since the author's wrongful imprisonment, but also in light of Queensland's firm refusal to consider ex gratia compensation until the conclusion of all appeals.

7.2 Counsel takes issue with the State party's characterization of special leave to appeal to the High Court as a constitutionally guaranteed right. He points out that the High Court itself has stated[1] that a special leave application to the High Court is not in the ordinary course of litigation; that any application must exhibit features which attract the Court's discretion in granting leave or special leave; and that there is no right of special leave. Thus, criminal proceedings in Queensland are final once the Court of Appeal of Queensland has decided.

7.3 On the issue of the State party's reservation to article 14 (6), counsel notes that the terms of the reservation only entitle the State party and Queensland to be exempt from legislating to give effect to the obligations under article 14 (6), but not to be exempt from its obligation under article 2 to take necessary steps to adopt other measures to give effect to the rights enshrined in the Covenant. In that context, he notes that Queensland has issued no administrative guidelines to give effect to the obligations under article 14 (6), and that the State party's (and Queensland's) additional requirements that any persons must demonstrate the existence of "exceptional circumstances", exemplified by the State party as "serious wrongdoing" by the investigating authority, establishes prerequisites for compensation not envisaged by article 14 (6).

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The facts laid out in the communication, which have not been contested by the State party, show that Mr. Irving was subject to manifest injustice. It would appear that they raise a serious issue regarding compliance by the State party with article 14, paragraph 3 (d), of the Covenant, as Mr. Irving was repeatedly denied legal aid in a case in which the High Court of Australia itself considered that the interests of justice required such aid to be provided. It would therefore appear that Mr. Irving should be entitled to compensation. The only claim made by the author of the communication was a claim based on article 14, paragraph 6, of the Covenant and the question before the Committee is therefore whether this claim is admissible.

8.3 The Committee recalls the conditions of application of article 14, paragraph 6:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

8.4 The Committee observes that the author's conviction in the District Court of Cairns of 8 December 1993 was affirmed by the Court of Appeal of Queensland on 20 April 1994. Mr. Irving applied for leave to appeal this decision before the High Court of Australia. Leave to appeal was granted and on 8 December 1997 the High Court of Australia quashed the conviction on the ground that the author's trial had been unfair. As the decision of the Court of Appeal of Queensland was subject to appeal (albeit with leave) on the basis of the normal grounds for appeal, it would appear that until the decision of the High Court of Australia, the author's conviction may not have constituted a "final decision" within the meaning of article 14, paragraph 6. However, even if the decision of the Court of Appeal of Queensland were deemed to constitute the "final decision" for the purposes of article 14, paragraph 6, the author's appeal to the High Court of Australia was accepted on the grounds that the original trial had been unfair and not that a new, or newly discovered fact, showed conclusively that there had been a miscarriage of justice. In these circumstances, the Committee considers that article 14, paragraph 6, does not apply in the present case, and this claim is inadmissible ratione materiae under article 3 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author, his counsel and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] In the case of Collins v. The Queen (1975) B, CLR 120.

APPENDIX

Individual opinion of Committee members Mr. Louis Henkin and Mr. Martin Scheinin (dissenting)

We believe that there was a violation of article 14, paragraph 6. That provision reads:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

The Committee's conclusion that the State party had no obligation to provide compensation was based on either of two separate grounds. We disagree.

(a) We are of the opinion that the conviction of Mr. Irving was "final". In our opinion, the word "final" in article 14, paragraph 6, cannot be understood to mean that only a conviction that cannot be reversed would be considered final. If that were the case, the reference to a final decision being reversed would have no meaning. We believe that, due to differences between legal systems, there cannot be a single criterion of what, in this context, is a final conviction. Therefore, the Committee must make a case-by-case assessment whether the conviction had become final.

In the present case Mr. Irving was convicted by the District Court of Cairns in December 1993. The Queensland Court of Appeal dismissed his appeal in April 1994. Further appeal to the High Court of Australia was available only by a special leave of appeal, for which purpose Mr. Irving unsuccessfully sought legal aid. Throughout the appeal proceedings, Mr. Irving apparently served his prison sentence.

In our opinion the conviction of Mr. Irving became "final" when the ordinary period during which leave of appeal was to be sought expired, and, due to the denial of legal aid, Mr. Irving was not able apply for leave of appeal. In the normal course of proceedings, this unspecified date in 1994 is the point of time when the conviction became "final". It was only in December 1997 that the High Court quashed the original conviction and ordered retrial.

As an alternative ground on which to determine whether a conviction was final, we refer to an earlier case decided by the Committee, W.J.H. v. The Netherlands (Communication No. 408/1990). In this case the Committee took the position that a conviction by a court of first instance was not to be considered final, inter alia because the author "did not suffer any punishment" as a result of that conviction (para. 6.3).

(b) The text of article 14, paragraph 6, is unclear as to whether the words "new or newly discovered fact" relate only to a pardon or refer also to the case of reversal. In the present case, the majority of the Committee adopted the view that article 14, paragraph 6, requires a new or newly established fact both as regards reversal and as regards pardon.

We believe that properly interpreted this requirement applies only to pardon and not to reversal. In our opinion, this approach was confirmed by the Committee in the case of Paavo Muhonen v. Finland (Communication No. 89/1981) where the Committee read the provision in question as treating the case of reversal independently of the requirement of a new or newly established fact (para. 11.2).

(Signed) Louis Henkin

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

D. Communication No. 925/2000, Koi v. Portugal (Decision adopted on 22 October 2001, seventy-third session)*

Submitted by:	Mr. Wan Kuok Koi (represented by counsel, Mr. Pedro Redinha)
Alleged victim:	The author
State party:	Portugal
Date of communication:	15 December 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 October 2001,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 15 December 1999, is Mr. Wan Kuok Koi, a citizen of Portugal and resident of Macao, at present serving a sentence of imprisonment at Coloane Prison in Macao. At the time of submission of the communication, Macao was a territory under Chinese sovereignty and Portuguese administration (article 292 of the Portuguese Constitution). The author claims to be a victim of a violation of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 Portugal is a party to the International Covenant on Civil and Political Rights since 15 September 1978 and a party to the Optional Protocol since 3 August 1983. On 27 April 1993, Portugal made a notification concerning the application of the Covenant to Macao. There is no record of a notification of territorial application of the Optional Protocol to Macao. However, there is no reservation or declaration by Portugal excluding the application of the Optional Protocol to Macao.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

The text of five individual opinions signed by members: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rafael Rivas Posada, Mr. Martin Scheinin and Mr. Maxwell Yalden, are appended to the present document.

1.3 At the time of submission of the communication, Macao was still under Portuguese administration. It reverted to Chinese administration on 20 December 1999, four days after submission of the communication against Portugal.

1.4 Until 19 December 1999, the status of Macao was governed by the Basic Statute of Macao of 15 February 1976 (Lei No. 1/76). Article 2 of the Statute stipulated that the territory of Macao constituted a legal personality under internal public law, with administrative, economic, financial and legislative autonomy within the framework of the Portuguese Constitution. The judiciary remained part of the Portuguese administration of justice. Macao's status under public international law was also defined in the Sino-Portuguese Joint Declaration of Beijing of 13 April 1987 (in force 15 January 1988), pursuant to which Macao's status was determined to be Chinese territory under Portuguese administration, as already provided for by secret arrangements of 1976. Indeed, in the Portuguese Constitution of 2 April 1976, Macao is not included among the territories under Portuguese sovereignty, but is referred to as a territory under Portuguese administration.

The facts as submitted

2.1 The author was arrested on 1 May 1998 at the Coloane Prison in Macao, under suspicion of being the moral author of an alleged attempt against the Director of the Macao Judiciary Police. He was brought before the Judge of Criminal Prosecutions 48 hours later, who considered that there was no evidence linking the author to the alleged attempt, but that he was suspected of the crime of secret association. He was accordingly placed in preventive detention.

2.2 In May 1998 the author unsuccessfully challenged his detention before the High Court of Macao (Tribunal Superior de Justiça de Macao, the Supreme Court of the Territory), judgement being rendered on 21 July 1998 on the grounds that "the defendant is a member of 14-K (carats) secret association".

2.3 The trial at the Court of Generic Competence of Macao (Tribunal de Competência Genérica) against the author and nine other defendants on the charge of involvement in the crime of secret association was opened on 27 April 1999 but immediately adjourned to 17 June 1999. The Chief Judge, however, tendered his resignation and left the Territory of Macao. It is alleged that pursuant to the applicable procedure, the lawsuit should immediately have been referred to the legal substitute of the Chief Judge. Instead of following this procedure, a new judge was recruited from Portugal, who came to Macao expressly to preside over this trial, and who returned to Portugal immediately after its conclusion. It is alleged that such procedure was illegal and in breach of article 31.2 of Decree-Law No. 55/92/M of 18 August 1992.

2.4 The trial was successively postponed to 29 September and 11 October 1999. It is alleged that the rights of defence were violated, in particular the right to be presumed innocent, which the Chief Judge is said to have breached by expressing on different occasions, as early as the initial hearing, a pre-judgement about the author's guilt. Moreover, it is stated that the defence attorneys were initially prohibited from having any contact with their clients until the end of the production of testimonial evidence in court (a measure lifted after protests in the press).

The Macao Bar Association is said to have addressed an urgent communication to the Judiciary Council of the territory complaining about the judge's orders dictated into the minutes referring to the defendants as "naturally dangerous" and suggesting that the attorneys would intimidate the witnesses.

2.5 Eight of the ten defendants, amongst them the author, filed a petition requesting the rejection of the new Chief Judge in view of doubts as to his impartiality on the basis of certain remarks of the judge allegedly by showing bias, but the High Court (Tribunal Superior de Justicia de Macao), by judgement of 15 October 1999 dismissed the petition and refused to decree a suspension of the judge in question, allowing the trial to proceed. A second challenge against the judge's impartiality was filed on 25 October 1999 and rejected on 29 October 1999. On this date author's counsel withdrew, arguing in a statement presented to the Secretariat of the Court that he could not continue to assure in a valid and efficient manner his client's defence. Following the withdrawal of author's counsel, the Chief Judge appointed as official defender a young lawyer who was among the public to attend the hearing, but rejected the new lawyer's request for a suspension of the hearing to allow for consultation of the files. Said newly appointed lawyer also withdrew, whereupon the Chief Judge appointed first one clerk of the court and then another, neither one of whom had the minimum conditions to assure the defence. The author was thus tried without the assistance of an attorney of record and without being offered the opportunity of appointing a new attorney.

2.6 On 29 October 1999 a third petition for the rejection of the Chief Judge was lodged, which was dismissed on 8 November 1999.

2.7 Judgement was rendered on 23 November 1999, and the author was convicted and sentenced to 15 years of imprisonment. An appeal was filed with the Court of Second Instance (Tribunal de Segunda Instância, Case No. 46/2000), which was heard in March 2000, judgement being rendered on 28 July 2000. The Tribunal of Last Instance (Tribunal de Ultima Instância), by judgement of 16 March 2001, affirmed the second instance court's findings).

2.8 Counsel states that the same matter has not been submitted to any other international procedure of investigation and settlement.

The complaint

3. Counsel claims multiple violations of article 14 concerning the alleged denial of a fair hearing before a competent and impartial tribunal, the alleged violation of the presumption of innocence, and the alleged violation of fundamental guarantees of the defence, including access of counsel to the accused and proper representation of the accused during the trial.[1]

The State party's observations and author's comments thereon

4.1 In its submission of 29 June 2000, the State party refers to article 2 of Macao's Statute, pursuant to which Macao enjoyed autonomy and did not fall under the sovereignty of Portugal. It argues that whereas the application of the Covenant was extended to Macao by the Portuguese Parliament by virtue of resolution 41/92 of 17 December 1992, no such resolution was adopted with respect to the Optional Protocol.

4.2 The State party also indicates that the Optional Protocol is not among the treaties listed in the note addressed by the Portuguese Government in November 1999 to the United Nations Secretary-General concerning those treaties for which the People's Republic of China had agreed to assume the responsibilities of succession.

4.3 The State party quotes the text of article 1 of the Optional Protocol, indicating that Macao was not a State party to the Protocol. Accordingly, it requests the Committee to declare the communication inadmissible.

4.4 In the alternative, the State party requests that the case be declared inadmissible because, since Portugal is no longer responsible for Macao, there is no legitimate international procedure.

4.5 Moreover, the State party contends that domestic remedies have not been exhausted, since the decision on the author's appeal is still pending. It is not relevant that the decisions concerning the petitions against the Chief Judge are final, since the exhaustion of domestic remedies should be understood as applying to the entire procedure. Moreover, the decision on appeal will no longer be the responsibility of Portugal, since it will be taken by a Court of the Macao Special Administrative Region, which is under the jurisdiction of the People's Republic of China.

5.1 In his comments, dated 29 September 2000, the author argues that the Optional Protocol is complementary to the Covenant and therefore its application in Macao should be deemed to have been effected by resolution 41/92 of 17 December 1992.

5.2 Notwithstanding the transfer of administration to the People's Republic of China on 19/20 December 1999, it is clear that the events complained of occurred in the period when Portugal was responsible for Macao and bound by the Optional Protocol.

5.3 With regard to the alleged non-exhaustion of domestic remedies, the author contends that it is legitimate to sever the decisions concerning the impartiality of the judge from the decision on the author's guilt or innocence. It is stressed that the violations alleged were perpetrated by a court under Portuguese jurisdiction and not by the courts under the jurisdiction of the People's Republic of China. Moreover, the pending appeal before the Second Instance Court was finally decided on 28 July 2000.

5.4 The Second Instance Court examined the author's allegations, inter alia, that the tribunal was neither competent nor impartial, that the Chief Judge was biased against the defendants, that the adversary principle and the principle of equality of arms were systematically violated (judgement, section 1.5.A.). The judgement reaffirmed the competence of the tribunal of first instance and found no merit in the author's other allegations of procedural irregularities. The author's conviction on charges of membership in a secret association and usury was affirmed. The sentence, however, was reduced to 13 years and 10 months. The Tribunal of Last Instance, by judgement of 16 March 2001, fully affirmed the judgement of the Tribunal of Second Instance.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the application of the Optional Protocol to Macao during the period under Portuguese administration, until 19 December 1999, the Committee notes that the State party adhered to the Optional Protocol with effect from 3 August 1983. It further notes that the application of the Protocol cannot be based on article 10 of the Optional Protocol, since Macao was not a constituent part of Portugal after adoption of the new Constitution in 1976. It is also not possible to draw a positive conclusion from the Portuguese Parliament's resolution 41/92 which formally extended the application of the Covenant to Macao, since the Covenant and the Optional Protocol are distinct treaties.

6.3 The Committee, on the other hand, does not share the view that the fact that an analogous declaration has not been made with regard to the Optional Protocol precludes the application of the Protocol to this case. The Committee recalls the language of article 1 of the Optional Protocol which stipulates in its first clause:

> "A State party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant."

All these elements are present in the case at hand. Portugal is a party to the Covenant, as well as to the Optional Protocol, and as such it has recognized the Committee's competence to receive and consider communications from individuals "subject to its jurisdiction". Individuals in Macao were subject to Portugal's jurisdiction until 19 December 1999. In the present case, the State party exercised its jurisdiction by the courts over the author.

As the intention of the Optional Protocol is further implementation of Covenant rights, its non-applicability in any area within the jurisdiction of a State party cannot be assumed without any express indication (reservation/declaration) to that effect. No act of this nature exists. Therefore, the Committee comes to the conclusion that it has the competence to receive and consider the author's communication insofar as it concerns alleged violations by Portugal of any of the rights set forth in the Covenant.[2]

6.4 With regard to exhaustion of domestic remedies, article 2 of the Optional Protocol states:

> "Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated *and who have exhausted all available domestic remedies* may submit a written communication to the Committee for consideration." (emphasis added)

> "The implications of this provision are clear: until such time as remedies available under the domestic legal system have been exhausted an individual who claims that his or her rights under the Covenant have been violated is not entitled to submit a communication to the Committee. It is therefore incumbent on the Committee to reject as inadmissible a communication submitted before this condition has been met. And indeed it has been the practice of the Committee not to receive communications when it is abundantly clear that available domestic remedies have not been exhausted. Thus, for example, in communications involving allegations of violations of fair trial in criminal cases, the Committee does not receive and register communications when it is clear that an appeal is still pending. The problem is that in many cases it is not self-evident from the communication itself whether domestic remedies were available and if so, whether they were exhausted by the author. In such cases the Committee has no choice but to register the communication and to decide on admissibility after considering the submissions of both the author and the State party on the issue of domestic remedies. When deciding whether to reject such communications as inadmissible under article 5, paragraph 2 (b) of the Optional Protocol, the Committee generally follows the practice of other international decision-making bodies and examines whether domestic remedies have been exhausted at the time of considering the matter (rather than at the time the communication was submitted). The rationale of this practice is that rejecting a communication as inadmissible when domestic remedies have been exhausted at the time of consideration would be pointless, as the author could merely submit a new communication relating to the same alleged violation. It should be noted, however, that the assumption underlying this practice is that the legal standing of the State party has not changed between the date of submission and the date of consideration of the communication, and that there would therefore be no legal impediments to submission of a new communication by the author relating to the alleged violation. When this assumption is invalid, the practice becomes incompatible with the requirements of the Optional Protocol."

6.5 In the present case both the author's claims concerning the lack of competence of the special Portuguese judge, as well as the other claims regarding alleged violations of article 14 of the Covenant in the course of the author's trial, were raised in the appeal to the Tribunal de Segunda Instância in Macao. This appeal had not yet been heard at the time of the submission of the communication. The judgements in this appeal and in a further appeal lodged with the Tribunal of Last Instance, were rendered on 28 July 2000 and 16 March 2001 respectively, when Macao was no longer administered by Portugal. It follows that domestic remedies had not been exhausted when the communication was submitted and that the author was therefore not entitled, under article 2 of the Optional Protocol, to submit a communication. By the time the remedies had been exhausted the author was no longer subject to the jurisdiction of Portugal and his communication was inadmissible under article 1 of the Optional Protocol.

6.6 It should further be noted that the fact that the author's appeals were heard after Portugal no longer had jurisdiction over Macao in no way implies that these remedies ceased to be domestic remedies which had to be exhausted before a communication could be submitted against Portugal. While Macao became a special administrative region in the People's Republic of China after submission of the communication, its legal system remained intact, and the system of criminal appeals remained unchanged. Thus there remained remedies that had to be pursued under the domestic legal system, irrespective of the State which exercised control over the territory.

6.7 In conclusion, while the Committee is of the opinion that in the period during which Portugal exercised jurisdiction over Macao after it had acceded to the Optional Protocol, individuals subject to its jurisdiction who claimed their rights under the Covenant had been violated were entitled to submit communications against Portugal, it finds that the present communication is inadmissible, under articles 2 and 5, paragraph 2 (b) of the Optional Protocol.

7. The Human Rights Committee decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] These issues, including the question of the alleged breach of article 31.2 of the Decree-Law No. 55/92/M (see above para. 2.3), were addressed in the Judgement of the Tribunal de Segunda Instância of 28 July 2000 as well as in the judgement of the Tribunal of Last Instance of 16 March 2001.

[2] Cf. also the general rule embodied in article 29 of the Vienna Convention on the Law of Treaties.

APPENDIX

Individual opinion of Committee members, Messrs. Abdelfattah Amor and Prafullachandra Natwarlal Bhagwati (partly dissenting)

Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

With regard to the application of the Optional Protocol to Macao during the period under Portuguese administration, until 19 December 1999, the Committee notes that the State party ratified the Covenant and became a party to it from 15 September 1978, but so far as the Optional Protocol is concerned, it was not ratified until about 5 years later and it entered into force on 3 August 1983. Obviously, the Covenant and the Optional Protocol are two distinct treaties and the ratification of the former does not carry with it the ratification of the latter and that is why the Optional Protocol had to be separately ratified as a distinct treaty by the State party.

The first question that requires to be considered for determining the applicability of the Optional Protocol to Macao up to 19 December 1999 is whether there is anything in the language of the Optional Protocol to suggest that when the State party ratified the Optional Protocol, it became applicable to Macao as a territory under the administration of the State party. Article 10 of the Optional Protocol obviously cannot be invoked since Macao was not a constituent part of Portugal. Some reliance may be placed on article 29 of the Vienna Convention on the Law of Treaties which stipulates that "Unless different intention appears from the Treaty, or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

Now there are divergent views on whether the application of a treaty automatically extends to dependent territories or whether the extension needs a specific legal act. We do not think it would be a fruitful exercise to enter upon a discussion of these divergent views, since jurists are divided sharply on this issue. In any event, it is, in our view, clear that since Macao was at no material time a constituent part of Portugal, it could not be said to be a part of the territory of Portugal and hence the Optional Protocol could not be said to be binding on Macao by virtue of article 29 of the Vienna Convention on the Law of Treaties. The ratification of the Optional Protocol by Portugal did not therefore have the effect of making it automatically applicable to Macao.

It may also be pointed out that if, contrary to what I have held, article 29 of the Vienna Convention on the Law of Treaties were applicable, it would equally be applicable in relation to the Covenant and in that event the Covenant would have to be regarded as applicable right from the time it was ratified by Portugal. But it is indisputable that the Covenant did not become applicable to Macao from the moment of its ratification by Portugal. The Covenant was in fact extended to Macao for the first time by a resolution passed by the Portuguese Parliament on 17 December 1992. Until that time the Covenant was not applicable to Macao. It was by virtue of the Parliamentary Resolution dated 17 December 1992 that it became applicable to

Macao. The Parliamentary extension of the Covenant to Macao on 17 December 1992 also demonstrates that in any event, it was not the intention of Portugal, when it ratified the Covenant, to make it applicable to Macao. The conclusion is therefore inevitable that the Covenant became applicable to Macao for the first time on 17 December 1992.

Turning once again to the question of applicability of the Optional Protocol to Macao, I have already pointed out that the Optional Protocol did not become applicable to Macao by virtue of its ratification by Portugal. There is also an additional reason why the Optional Protocol could not be said to have become applicable on its ratification by Portugal. If the Covenant did not become applicable to Macao until 17 December 1992, how could the Optional Protocol which merely provides the machinery for redressing violations of the Covenant rights, become applicable to Macao at any earlier point of time? Since the Optional Protocol did not become applicable to Macao as a consequence of its ratification by Portugal, it becomes necessary to consider whether at any subsequent point of time, it was extended to Macao.

Now it is obvious that there was no explicit legal act by which the applicability of the Optional Protocol was extended to Macao. The only argument which the State party could advance in support of the applicability of the Optional Protocol to Macao was that the extension of the Covenant to Macao on 17 December 1992 carried with it also the extension of the Optional Protocol to Macao. But this argument is clearly unsustainable. In the first place, the Covenant and the Optional Protocol are two distinct treaties. The former can be ratified without ratification of the latter. The ratification of the Covenant does not therefore involve ratification of the Optional Protocol. If the contrary argument of Portugal were valid, there would be no necessity for a State party to the Covenant, separately to ratify the Optional Protocol, because the ratification of the Covenant would carry with it ratification of the Optional Protocol. But it is incontrovertible that the Optional Protocol does not become binding until it is ratified by the State party. Here, in the present case, it is significant to note that though the Covenant was extended to Macao on 17 December 1992 by a specific resolution passed by the Portuguese Parliament, the extension did not include the Optional Protocol. Portugal specifically made one treaty applicable to Macao but not the other. This clearly shows the intention of Portugal that, while the Covenant should be applicable to Macao, the Optional Protocol should not be. This also becomes abundantly clear from the fact that it was only the Covenant and not the Optional Protocol which was mentioned in the note sent by Portugal to the Secretary-General setting out the treaties for which China was going to be responsible. I have therefore no doubt that the Optional Protocol was not applicable to Macao at any time and hence the communication must be held to be inadmissible under article 2 of the Optional Protocol.

There was some argument debated in the Committee that in any event, the case would fall within article 1 of the Optional Protocol and since the author was within the jurisdiction of Portugal at the time of submission of the communication, the Committee would have jurisdiction to deal with the communication. But this argument suffers from a two-fold fallacy. In the first place, it postulates the applicability of the Optional Protocol to Macao so as to enable the author to invoke its article 1 for supporting the sustainability of the communication. But, as I have pointed out above, the Optional Protocol was not applicable to Macao at any time and hence this argument based on article 1 must fail. Secondly, in order to attract the applicability of article 1, what is necessary is that the author who complains of violation of his Covenant rights must be subject to the jurisdiction of the State party not only when the Committee receives the communication but also when the Committee considers the communication. The language of article 1 speaks of "the competence of the Committee to receive and consider the communication". Here, in the present case, when the Committee is considering a communication the author is no longer subject to the jurisdiction of Portugal, because China took over the administration of Macao on 20 December 1999. Article 1 has therefore, in any event, no application in the present case.

So far as the question of exhaustion of domestic remedies is concerned, article 5 (2) (b) requires that the author of a communication must have exhausted all domestic remedies by the time the Committee considers the communication. The Committee is precluded from considering any communication unless the author has exhausted all domestic remedies. Therefore, the point of time at which the question of exhaustion of domestic remedies is required to be considered is when the Committee is considering the communication. It is common ground that at the present time when the Committee is considering the author's communication, the author has exhausted all domestic remedies. The communication cannot therefore be held to be inadmissible on the ground of non-exhaustion of domestic remedies under article 5 (2) (b) of the Optional Protocol.

In the result, we hold that the communication is inadmissible.

(Signed) Abdelfattah Amor

(Signed) Prafullachandra Natwarlal Bhagwati

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Nisuke Ando (partly dissenting)

In the present case I agree with the Committee's conclusion that the communication is inadmissible because the author was no longer subject to the jurisdiction of Portugal both when his appeals were heard by the Court of Second Instance in May 2000 and when the Tribunal of Last Instance rendered its judgement in March 2001 (see paragraphs 6.4, 6.5 and 2.7). However, I am unable to share the Committee's view that non-applicability of the Optional Protocol in any area within its jurisdiction of a State party cannot be assumed without an express indication to that effect (para. 6.3). In my view this assumption of the Committee is not fully convincing for the following reasons:

First of all, the State party clearly indicated that, whereas the application of the Covenant was extended to Macao by a resolution of the Portuguese Parliament, no such resolution was adopted with respect to the Optional Protocol (para. 4.2). Secondly, the Committee accepts the State party's statement that the Optional Protocol is not, whereas the Covenant is, among the treaties listed in its note to the United Nations Secretary-General with respect to which the Chinese Government has agreed to assume responsibilities of succession (para. 4.1). Thus, thirdly, while the Committee accepts that the continued application of the Covenant requires "express" indication of a State concerned (China in the present case), it seems to assume that no such indication is required with respect to the extension of application of the Optional Protocol (Portugal in the present case).

In regard to the third point, it must be admitted that, while the continued application of the Covenant is an issue between two different States (China and Portugal), the extension of application of the Optional Protocol to Macao is an issue within one and the same State (Portugal alone). Nevertheless, the fact remains that, while the Covenant has become applicable to the Macao Special Administrative Region by the "express" indication of China, the Optional Protocol has not become applicable to the same region in the absence of "express" indication of the same State. In this connection, it must be remembered that, according to the Committee's General Comment No. 26 entitled "Continuity of Obligations", "The Human Rights Committee has consistently taken the view … that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant".[1]

Personally, I agree with the Committee's view as a matter of policy statement, but I cannot agree with it as a statement of a rule of customary international law. As far as State practice with respect to the Covenant is concerned, only in the cases of the dismemberment of the former Yugoslavia and that of Czechoslovakia, each of the newly born States in Central and Eastern Europe except Kazakhstan (Kazakhstan has made no indication) indicated that it "succeeds to" the Covenant. All the other seceding or separating States indicated that they "accede to" the Covenant, which implies that they are not succeeding to the former States' Covenant obligations but are newly acceding to the Covenant obligations on their own. The corresponding State practice with respect to the Optional Protocol makes it clear that only the Czech Republic and Slovakia "expressly" succeeded to the Optional Protocol obligations.

Certainly the State practice shows that there is no "automatic" devolution of the Covenant obligations, to say nothing of the Optional Protocol obligations, to any State. A State needs to make an "express" indication as to whether or not it accepts obligations under the Covenant and/or the Optional Protocol. Absent of such an indication, it should not be assumed that the State has accepted the obligations.

It may be recalled that during the consideration of the fourth periodic report of Portugal on Macao, the Committee specifically posed the question: "What arrangements exist for the application of the Optional Protocol in the Macao Special Administration Region?" The delegation replied that the question of the Optional Protocol had not been addressed in its negotiation with China (CCPR/C/SR.1794, para. 9). From this reply it is difficult to determine whether or not the Optional Protocol, as distinguished from the Covenant, was considered as applicable in Macao. However, in response to the author's claims in the present case, Portugal expressly indicates that no resolution was adopted by its Parliament to extend the application of the Optional Protocol to Macao during its administration of the territory, suggesting that it has never intended to apply the Optional Protocol there.

(Signed) Nisuke Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Note

[1] Document No. A/53/40, annex VII, para. 40.

Individual opinion by Committee members, Messrs. Eckart Klein, Rafael Rivas Posada and Maxwell Yalden (partly dissenting)

In our view the Committee should have decided that the communication was admissible.

We agree with the Committee's finding that in the present case the Optional Protocol establishing the competence of the Committee to receive and consider communications is applicable to Macao.

However, we disagree with the finding that the author had not exhausted domestic remedies. We base our dissent on two interrelated grounds.

First, we do not think that further domestic remedies were, in fact, available to the author after the jurisdiction of Portugal over Macao had come to an end. It is true that by agreement between the State party and the People's Republic of China the system of criminal appeals was to remain unchanged. But it is likewise true that after 19 December 1999, the courts to which the author could have applied (and has done in fact) no longer came within the jurisdiction of the State party against which this communication had been directed. The author submitted his communication on 15 December 1999, only four days before Macao reverted to Chinese administration. To take the view that the author should have exhausted further domestic (i.e. Portuguese) remedies within this short period of time would be clearly unreasonable. Therefore, even if the essential moment for deciding the question when domestic remedies are exhausted were to be the time of submission of the communication and not that of its consideration by the Committee (an issue on which we need not comment here), this requirement would have been met due to the special circumstances of the present case.

Second, we believe that the Committee's view suffers from a further defect. Requesting the author at the time of submission of his communication to exhaust domestic remedies, since otherwise the communication would be inadmissible, on the one hand, and taking the line when he has done so that his communication is inadmissible because he is no longer subject to the jurisdiction of Portugal, on the other, creates an unacceptable situation in which the author is deprived of *any* effective protection which the Covenant and the Optional Protocol purport to ensure.

For these reasons we are of the view that the Committee should have declared the communication admissible.

(Signed) Eckart Klein

(Signed) Rafael Rivas Posada

(Signed) Maxwell Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member, Mr. David Kretzmer (partly concurring and possibly reserving his position)

Domestic remedies in this case had not been exhausted when the communication was submitted. For the reasons set out in the Committee's Views the communication is therefore inadmissible even on the assumption that the Optional Protocol to alleged violations of the . Covenant carried out by the authorities in Macao before the transfer of jurisdiction to the People's Republic of China. I believe that in these circumstances it was unnecessary for the Committee to decide whether the Optional Protocol did indeed apply to such alleged violations. I reserve my opinion on this question.

(Signed) David Kretzmer

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Committee member Mr. Martin Scheinin (dissenting)

It needs to be pointed out at the outset that although the majority of the Committee came to the conclusion that the communication is inadmissible, there was no majority for any specific reason for inadmissibility. The reasons given in the decision itself were formulated by a minority of Committee members, representing the majority position among those who came to inadmissibility as conclusion.

In my opinion the decision is to be seen as an anomaly in the Committee's jurisprudence. It is the established position of the Committee that article 5, paragraph 2 (b) is the clause in the Optional Protocol that prescribes the requirement of exhaustion of domestic remedies as a condition for admissibility. The reference to exhaustion of domestic remedies in article 2 as a condition for the submission of an individual communication is to be understood as a general reflection of this rule, not as a separate admissibility requirement. The requirement of exhaustion of domestic remedies is subject to the discretion of the Committee (art. 5, para. 2 in fine). Also, it is a recoverable ground for inadmissibility (rule 92.2 of the Committee's rules of procedure). Consequently, it would be absurd to read into article 2 an additional requirement that domestic remedies must be exhausted prior to the submission of a communication and to declare a communication inadmissible in a case where domestic remedies were not yet exhausted at the time of submission but have been exhausted by the time when the Committee has the opportunity to make its decision on admissibility.

The specific circumstances of transfer of sovereignty over Macao do not change the situation. If that change has any effect on the requirement of exhausting domestic remedies, it is because the available remedies after the transfer might not be regarded as effective ones in respect of Portugal. Consequently, domestic remedies would be exhausted in respect of Portugal on the date of transfer of sovereignty, irrespective of the stage where the proceedings were on that date.

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 940/2000, Zébié v. Côte d'Ivoire (Decision adopted on 9 July 2002, seventy-fifth session)*

Submitted by:	Zébié Aka Bi (represented by counsel, Maître Joel Bataille and Maître Jean-Claude Richard)
Alleged victim:	The author
State party:	Côte d'Ivoire
Admissibility decision:	1 August 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and political Rights,

Meeting on 9 July 2002,

Adopts the following:

Decision on admissibility

1. The author is Mr. Zébié Aka Bi, born in Côte d'Ivoire and residing in France. He alleges to be a victim of a breach by Côte d'Ivoire of article 25 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

2.1 The author alleges that he is unable to participate in the presidential election in Côte d'Ivoire, in this case the election scheduled for 17 September 2000, either as a voter or as a candidate, as a result of the new provisions of article 35 of the Constitution and of the Electoral Code.

2.2 The author explains that, by Decree No. 200-497 of 17 July 2000 amending the draft Constitution, the head of State, General Robert Guei, revised article 35, paragraph 3, of the Constitution relating to conditions for election to the post of President of the Republic, in the following terms: "He must be of Ivorian origin, born of a father and mother who themselves are of Ivorian origin. He must never have renounced Ivorian nationality." These eligibility criteria were also included in articles 53 and 54 of the draft Electoral Code. Finally, they were approved by a referendum held on 23 July 2000, which led to the adoption of the draft amendment to the Constitution and draft Electoral Code.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.3 The author states that the Constitution and the Electoral Code were amended in the context of the political situation in Côte d'Ivoire, namely the deposition of the former President of the Republic by the military junta currently in power and responsible for organizing the next presidential election.

2.4 Owing to the new provisions of the Constitution and the Electoral Code, the author claims to have been deprived, first of all, of his right to vote for the candidate of his choice, who would not be able to stand in the presidential election because he did not meet the criteria relating to national origin and nationality. Moreover, the author draws attention to his dual nationality - Ivorian and French - and alleges that, owing to the eligibility criteria relating to non-renunciation of Ivorian nationality, which in his view imply that no other nationality has been claimed, he is unable, contrary to his wishes, to stand in the presidential election.

The complaint

3.1 The author challenges the criteria for standing in presidential elections insofar as they discriminate against him and are contrary to article 25 of the Covenant.

3.2 Referring to General Comment No. 25 of the Human Rights Committee on article 25 of the Covenant, the author contends that citizenship alone determines the granting of political rights and that no distinctions are permitted between citizens in the enjoyment of those rights on the grounds of race, colour, birth or other status. Moreover, he points out that only restrictions based on objective and reasonable criteria are justifiable. Finally, he quotes paragraph 15 of General Comment No. 25, which reads in part: "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as [...] descent [...]."

3.3 The author contends that the requirement of exhaustion of domestic remedies should be considered with due regard for efficiency and urgency. He argues that, owing to the political and legal legitimacy of the new Constitution and Electoral Code following their adoption by referendum, no domestic remedy could be effectively sought against the eligibility criteria. He adds that the political situation in Côte d'Ivoire must be taken into account, namely that presidential elections were organized after the military's seizure of power. Finally, since the Electoral Code provides that the list of candidates should be finalized at least a fortnight before the election date of 17 September 2000, the author, who brought the case to the Human Rights Committee on 27 July 2000, stresses the urgency of his communication.

3.4 The author alleges that Côte d'Ivoire has violated article 25 of the Covenant.

3.5 The author states that the case is not being examined under another procedure of international investigation or settlement.

The State party's observations on admissibility

4.1 In its observations of 7 October 2000, the State party disputes the admissibility of the communication.

4.2 In the first place, the State party contends that the author's Ivorian nationality has not been proven. The State party points out that Act No. 61-45 of 14 December 1961 on the Ivorian Nationality Code, amended by Act No. 72-852 of 21 December 1972 provides, in article 1, paragraph 2, that "nationality is acquired or lost after birth by virtue of the law or a decision of the public authorities taken in accordance with the provisions of the law". Moreover, under article 89 of that Act, proof of Ivorian nationality must be adduced by the person who claims to have such nationality.

4.3 The State party alleges that the author never produced any evidence to support his claim that he is Ivorian, especially since birth on Ivorian soil is not a condition for the acquisition of Ivorian nationality.

4.4 The State party adds that article 48 of the aforementioned Nationality Code provides that "Ivorian adults who voluntarily acquire a foreign nationality or who claim another nationality shall lose their Ivorian nationality."

4.5 According to the State party, even if the author produced evidence that he was Ivorian, Mr. Aka Bi Zébié, having acquired French nationality on 24 August 1983 (pursuant to article 135 of the French Nationality Code), lost his Ivorian nationality beginning on that date, that is, 17 years ago.

4.6 The State party concludes that the author is not under the jurisdiction of Côte d'Ivoire and that, in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee should declare itself incompetent in the case.

4.7 Secondly, the State party alleges that the author has not exhausted domestic remedies.

4.8 The State party indicates that the author has never adduced any evidence that he brought his case before Ivorian courts and has exhausted domestic remedies. In addition, the State party emphasizes that the date of 17 September 2000 set for the presidential election is not correct and, moreover, was used by the author as a pretext for circumventing domestic remedies. The State party indicates that the date of the presidential election has been postponed to 22 October 2000. According to the State party, the author does not adduce any evidence that he has initiated any proceedings in an Ivorian court since the postponement of that date. The State party explains that the author could have brought his case to the Constitutional Council established by the new

Constitution and whose functions are temporarily being carried out by the Constitutional Chamber of the Supreme Court.[1] Moreover, the State party contends that the author could, through a simple request, apply to the President of the Supreme Court for a summary ruling - a provision applied in urgent cases by virtue of article 79[2] of Act No. 94-440 of 16 August 1994 establishing the composition, organization, functions and operation of the Supreme Court.

4.9 Finally, the State party stresses that the author did not register as a presidential candidate, which constitutes an abuse of his right to submit a communication to the Committee.

The author's comments on the State party's submissions

5.1 In his letter of 10 January 2002, the author stated that he did "not intend to respond to the State party's submissions".

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the author has produced no arguments relating to any efforts he has made to claim his rights, either as a voter or as a candidate in the presidential election. Under the circumstances, the Committee considers that the author has not demonstrated that he is a victim of a violation of the Covenant and that the communication is therefore inadmissible under article 1 of the Optional Protocol.

6.4 In the circumstances, it is unnecessary for the Committee to consider the other arguments put forward by the State party concerning admissibility.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in French, English and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] Order No. 2000-428 of 9 June 2000 establishing the Constitutional Chamber. Article 1: "A special chamber, called the 'Constitutional Chamber', responsible for monitoring and verifying the legality of the referendum and presidential and legislative elections in the year 2000, is hereby established as a body of the Supreme Court"; article 6: "The Constitutional Chamber shall rule, in accordance with the provisions currently in force, on the eligibility of candidates for the presidential and legislative elections ...".

[2] Article 79: "In all urgent cases, the President of the Administrative Chamber may, on the basis of a simple request: (a) appoint an expert to establish without delay whether or not there are grounds for proceedings to be brought before the Administrative Chamber: counsel for the defence, if any, shall be notified immediately; and (b) order any other useful measures, without prejudice to the substance of the case and without hindering the execution of any administrative decision."

F. Communication No. 1005/2001, Sánchez González v. Spain (Decision adopted on 21 March 2002, seventy-fourth session)*

Submitted by:	Ms. Concepción Sánchez González (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	16 July 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2002,

Adopts the following:

Decision on admissibility

1. The author, Concepción Sánchez González, a Spanish national, claims to be a victim of violations by Spain of articles 14 and 26 of the International Covenant on Civil and Political Rights. She is represented by counsel.

The facts as submitted by the author

2.1 The author worked in an infant school in the municipality of Los Alcázares as an aide, although both she and her colleague Teresa Barranco Campillo discharged the functions of infant schoolteacher. Both filed a complaint against the municipality of Los Alcázares in which they claimed that they should be paid at the rate for staff in the infant schoolteacher category rather than the aide category, in which they were classified.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

2.2 On 31 July 1995 the Murcia Court of First Instance dismissed the complaint, finding that the author and her colleague were in the aide category and did not carry out higher-level functions. Both appealed against the decision before the Social Division of the Murcia High Court, which on 3 December 1997 handed down a judgement in favour of Teresa Barranco Campillo only, on the basis of the fact that she held a qualification as a primary schoolteacher, with a specialization in humanities, even though both she and the author discharged identical functions.

2.3 The author submitted an appeal for annulment to the Social Division of the High Court, which on 9 July 1998 dismissed the appeal. The author subsequently submitted an appeal for amparo, which was found inadmissible on 3 June 1999.

The complaint

3.1 The author regards the fact that, in the amparo proceedings before the Constitutional Court, she was denied the opportunity to appear without being represented by a procurador,[1] to be contrary to article 14, paragraph 1, and article 26 of the Covenant, since article 81, paragraph 1, of the Constitutional Court Organization Act allows a lawyer to appear without a procurador, whereas those who are not lawyers must be so represented.

3.2 The author alleges violation of article 26 of the Covenant since she and her colleague, although discharging identical functions in identical posts, have been treated differently by the courts on the basis of a university degree which is not relevant to the matter.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has ascertained that, as provided for in article 5, paragraph 2 (a), of the Optional Protocol, the same matter is not being examined under another procedure of international investigation or settlement.

4.3 The author claims that there was a violation of article 14, paragraph 1, and article 26 of the Covenant on the ground that she was denied the opportunity to appear before the Constitutional Court without being represented by a procurador. The author claims that it is discrimination not to require persons with a law degree to be represented before the Constitutional Court by a procurador when persons without a law degree are required to be so represented. With reference to its earlier case law,[2] the Committee recalls that, as the Constitutional Court itself has argued, the requirement for representation by a procurador reflects the need for a person with legal training to assume responsibility for proceedings in connection with appeals to that court. With regard to the author's claims that such a requirement is not based on objective and reasonable criteria, the Committee does not consider the allegations to have been satisfactorily substantiated for the purposes of admissibility. Accordingly this aspect of the communication is inadmissible under article 2 of the Optional Protocol.

4.4 Both the author and her colleague were employed as aides until the latter was promoted to infant schoolteacher as she held a qualification as a primary schoolteacher. With regard to the author's claims regarding violation of article 26 in that she and her colleague were treated differently because her colleague held a university degree while the author did not, the Committee points out that distinction does not necessarily imply discrimination, provided that it is based on objective and reasonable criteria. The Committee considers that the author's complaint regarding the violation of article 26 has not been satisfactorily substantiated for the purposes of admissibility; accordingly this aspect of the communication is also inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in French, English and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] A *procurador* is a person qualified in law and a member of the Bar Association whose function it is to represent [clients] in most judicial proceedings, see to the settlement of lawsuit costs and take an active part in all official decisions and proceedings.

[2] *Marina Torregruesa Lafuente et al. v. Spain*, Views adopted on 16 July 2001, and *Alejandro Marin Gómez v. Spain*, Views adopted on 22 October 2001.

G. Communication No. 1048/2002, Riley et al. v. Canada (Decision adopted on 21 March 2002, seventy-fourth session)*

Submitted by:	Mr. Kenneth Riley et al.
Alleged victims:	The authors
State party:	Canada
Date of communication:	8 February 2001

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2002,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 8 February 2001, are Kenneth Riley, Howard Stacey Davis, and Kirsten Margrethe Mansbridge, all Canadian nationals, who claim to be victims of violations of articles 2, paragraphs 1 and 3, 9, paragraph 1, 18, 23, paragraphs 3 and 4, and 26 of the International Covenant on Civil and Political Rights. The authors are not represented by counsel.

Facts as presented by the authors

2.1 In 1990, the Canadian Government revised the Royal Canadian Mounted Police ("RCMP") regulations allowing the Commissioner, under section 64 (2) of these regulations, to "exempt any member from wearing any item of the significant uniform … . On the basis of the member's religious beliefs". Subsequently, one Khalsa Sikh officer was authorized to substitute turbans for the traditional wide brimmed "mountie" stetson and forage cap.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Patrick Vella.

2.2 Riley and Davis are both retired from the Royal Canadian Mounted Police ("RCMP") and are members of an organization whose goal is to maintain tradition within the RCMP. The authors sought an order from the Federal Court of Canada (Trial Division), that the Commissioner of the RCMP be prohibited from allowing the wearing of religious symbols as part of the RCMP uniform. In particular, they claimed that the Commissioner's decision to allow the wearing of the Khalsa Sikh turban instead of the stetson is unconstitutional. On 8 July 1994, the Federal Court dismissed the author's claim deciding that there was no violation of the Canadian Charter.

2.3 The authors appealed their case to the Federal Court of Canada (Appeals Division). On 31 May 1995, the Appeals Division affirmed the Trial Division's decision. The author's application for leave to appeal this decision was subsequently dismissed by the Supreme Court, which did not provide any reasons for its decision.

2.4 The authors state that to understand how they are personally affected by section 64 (2) of the RCMP regulations one must understand that the RCMP is more than a federal police force and that its 20,000 officers permeate all levels of law enforcement in Canada and that the RCMP is an integral part of their daily lives. They also state that the actio popularis strategy of the authors' action in the Federal Court corresponds to the individual obligations entrusted by the Preamble to the Covenant. As the preamble stipulates "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant", the authors believe that they do have standing before the Human Rights Committee.

The complaint

3.1 The authors claim that the display of Khalsa Sikh symbols by Canada's national police imputes RCMP-State endorsement of the exclusively male "soldier-saint" Khalsa Sikh order, contrary to article 3 of the Covenant.

3.2 They also claim that article 9, paragraph 1, embodies the principle of fundamental justice free of any apprehension of bias. They claim that police officers of the State should not only act in an impartial manner but exhibit an appearance of impartiality when exercising law enforcement powers. According to the authors, there is overwhelming evidence to suggest that the display of religious beliefs by a police officer would raise an apprehension of bias in many Canadians.

3.3 Furthermore, the authors claim that in order to protect their rights under article 18 of the Covenant the State should remain secular and that section 64 (2) of the RCMP regulations violates their rights under this article of the Covenant as it introduces a denominational face to the most visible State agency.

3.4 In addition, the authors claim a violation of article 23, paragraphs 3 and 4, as the Khalsa Sikh religious beliefs uphold the practice of arranged marriages in Canada. It is argued that RCMP affiliation with that Order reflects State endorsement of this practice.

3.5 Finally, the authors claim a violation of articles 26 and 2, paragraph 1, as the authors' rights (at least one of whom is a Roman Catholic) to equal protection and equal benefit of the law is violated by this regulation which involves the RCMP in the advancement of Khalsa Sikh religious and political interests. The authors claim that this special status allowed to Khalsa Sikhs, creates a distinction on the basis of religion and is contrary to articles 2, paragraph 1, and 26, as it is denied to other groups.[1]

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has noted the authors' claims that they are victims of violations of articles 3, 9, paragraph 1, 18, 23, paragraphs 3 and 4, 26, and 2, paragraph 1, because Khalsa Sikh officers of the RCMP are authorized to wear religious symbols as part of their RCMP uniform. In particular, the Committee notes the authors' claim under articles 26, and 2, paragraph 1, that this is a special status allowed to Khalsa Sikhs, which is denied to other religious groups. The Committee is of the view that the authors have failed to show how the enjoyment of their rights under the Covenant has been affected by allowing Khalsa Sikh officers to wear religious symbols. Therefore, they cannot be considered to be "victims" within the meaning of article 1 of the Optional Protocol.

5. The Committee, therefore, decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] In the judgement of the Federal Court the trial judge stated that "no witness has been called who claimed an exemption on religious or other similar ground and who had been refused. Not only is there no concrete instance of discrimination before me but the Agreed Statement of Fact states that the RCMP would consider any request for exemption on religious grounds on a basis similar to that on which the Khalsa Sikh's request to wear the turban was granted".

H. Communication No. 1055/2002, I.N. v. Sweden (Decision adopted on 8 July 2002, seventy-fifth session)*

Submitted by: Mr. Asbjörn Skjoldager

Alleged victim: I.N. (name withheld)

State party: Sweden

Date of communication: 14 July 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 July 2002,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Asbjörn Skjoldager, a Swedish national. Referring to the authorization from the parents of the alleged victim, he purports to present the communication on behalf of Mr. I.N., an incapacitated mental health patient. The author does not specify the articles of the Covenant claimed to be violated, but the matters complained of would appear to raise issues primarily under article 9 and subsidiary issues under article 7.

1.2 The International Covenant on Civil and Political Rights and the Optional Protocol both entered into force for the State party on 23 March 1976. Upon acceding to the Optional Protocol, the State party entered a reservation to the Optional Protocol which reads: "On the understanding that the provisions of article 5, paragraph 2, of the Protocol signify that the Human Rights Committee provided for in article 28 of the said Covenant shall not consider any communication from an individual unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The complaint

2.1 The author contends that the alleged victim, who suffers from a measure of mental disability, has been detained in an institution for the mentally disabled without legal authorization on an ongoing basis. The author contends that the conditions of detention are such that detainees are unable to properly exercise normal freedom of movement. The author contends that the alleged victim has exhausted available domestic remedies concerning this situation.

2.2 On 23 January 1996, the author introduced an application concerning the same facts and issues to the European Commission of Human Rights. On 22 February 1996, the application was registered under file No. 30274/96. On 9 March 1998, a Committee of the Commission, established by article 20, paragraph 3, of the European Convention on Human Rights, had the case transferred to it by the Commission, received a report provided for in rule 47 of the Commission's rules of procedure, and, after deliberation, found that the matters complained of did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

Issues and proceedings before the Committee

3.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

3.2 The Committee notes that on the basis of the material submitted by the author it is not clear whether the author has proper authorization to represent the alleged victim, whether the communication is intended to address the individual case of Mr. I.N. or a more general situation, whether the domestic remedies were in fact exhausted or whether the same matter was not already examined by the European Commission of Human Rights in the meaning of the reservation by the State party referred to in paragraph 1.2 above. Nevertheless, the Committee considers that even if these matters were clarified, the author has not substantiated, for purposes of admissibility, any claim of a violation of the Covenant.

4. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 1065/2002, Mankarious v. Australia (Decision adopted on 1 April 2002, seventy-fourth session)

Submitted by:	Makram Asham Andrawos Mankarious
Alleged victim:	The author
State party:	Australia
Date of communication:	27 November 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2002,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 27 November 2001, is Mr. Makram Asham Andrawos Mankarious, an Australian citizen, born in Cairo, Egypt, on 17 December 1950, who claims to be a victim of a violation by Australia[1] of article 26 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted by the author

2.1 The author emigrated from Egypt to Australia in 1972 and took residence in Melbourne. Between 10 July and 4 October 1974, he was a manual worker for Metro Plastics Pty. Ltd., a company that manufactured plastic materials using heavy moulds called plastic dies.

2.2 On 4 October 1974, during working hours, the author was the victim of an accident in which a heavy plastic-die weighing several tons broke loose from the crane on which it was hanging and fell on his right leg.

2.3 As a result of the accident, the author was immediately dismissed by the company and was told by the manager not to make any complaints. The company closed down three months later.

2.4 The author was initially treated at Alfred Hospital in Melbourne and was told by the doctor there that the injury was inoperable and that the only remedy was to rest. The author remained bed-ridden for 16 months following the accident and was unable to work. During this period he received no compensation from his employer.

2.5 In 1981, while his leg was increasingly painful, the author consulted a specialist in Melbourne who recommended an operation. The author was operated in 1982 and medical costs were paid by the Australian Department of Social Security that allegedly kept all the medical records and doctors' certificates. The operation did not prove very useful as the author continued to suffer.

2.6 The author then resided in the United Kingdom but does not provide any information as to the actions he has undertaken there with regard to his injury.

2.7 Informed that there were very good specialists in Switzerland for that kind of injury, the author travelled to Geneva in April 1996, where he had a medical check-up at the Hospital Cantonal. Doctors recommended an active treatment of the varicose veins and of an inguinal hernia by way of sclerotherapy.

2.8 In 1995, in order to defray medical costs for these treatments, the author requested legal assistance from the Law Institute of Victoria, Australia, which sent him a list of lawyers who may assist him. The author submits that he has never received assistance from those lawyers.

2.9 In May 1996, a Swiss lawyer, acting on behalf of the author, referred the case to the Australian Consulate in Geneva, which responded that the matter should directly be addressed to the Department of Social Security in Australia.

2.10 In November 1996, the author consulted another lawyer in Switzerland in order to start a procedure in Australia. Counsel for the author requested assistance of Australian lawyers who emphasized the difficulty of such a procedure because of the significant time period that had elapsed since the accident. Despite additional information on the case submitted by the Swiss counsel, the said Australian lawyers did not follow up on the case. No further actions were taken by the author in this regard.

2.11 Today, the author's injury continues to bleed. The author explains that this has greatly handicapped him and inhibited his ability to find full-time employment.

The complaint

3.1 The author claims that he is a victim of a violation of article 26 of the Covenant, as he has been denied equal access to social rights in Australia as well as to legal assistance.

3.2 The author also claims that he has been denied access to legal remedies in Australia and therefore considers that domestic remedies have been exhausted.

3.3 The author asks for medical expenses related to his leg injury to be assumed by the State party as well as for compensation for loss of earnings and for future earning capacity.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

4.2 The Committee observes that the author has not sufficiently substantiated, for purposes of admissibility, in what way he claims to be a victim of a violation of article 26 of the Covenant.

4.3 Moreover, the Committee considers that, while avenues were available to the author for submitting his case before Australian authorities, the author has not demonstrated that they would be unreasonably prolonged or unlikely to bring him effective relief. The Committee also notes that the author has failed to justify his apparent inaction during the time that has elapsed since he left Australia and until he took further steps in Switzerland in 1995.

5. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Note

[1] The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for the State party on 25 December 1991.

J. Communication No. 1087/2002, Hesse v. Australia (Decision adopted on 15 July 2002, seventy-fifth session)*

Submitted by:	Peter Hesse
Alleged victim:	The author
State party:	Australia**
Date of communication:	26 February, 6 August 2001, and 10 May 2002

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 2002,

Adopts the following:

Decision on inadmissibility

1. The author of the communication dated 26 February, 6 August 2001, and 10 May 2002, is Peter Hesse, who claims to be a victim of a violation by Australia of articles 7, 14, paragraph 1, and 26 of the International Covenant on Civil and Political Rights.[1] He is not represented by counsel.

The facts as submitted by the author

2.1 The author is a resident of Western Australia. While attending the public hospital, Sir Charles Gairdner Hospital, in Perth and two other hospitals between 1977 and 1989, the author was given 24 Intrathecal spine injections of the drug Depo-Medrol manufactured by the Pharmacia & Upjohn Company, allegedly without his consent. The doctors informed the author that the injections were harmless.

2.2 In 1977 the Health Department of Australia advised the Pharmacia & Upjohn Company that their product was unsuitable for Intrathecal use, and suggested that they introduce a warning on the product instructions. This, however, was not done. Then in 1982, the Pharmacia & Upjohn Company applied to the Australian Drug Evaluation Committee to have the drug passed for use in epidural spinal injections. The Committee rejected the application in 1983.[2] However, the Commonwealth Government Health Insurance Commission continued to pay for these injections. In 1992, the Federal Labour Government Health Minister, Brian Howe, disclosed in Parliament that Depo-Medrol had never been passed or evaluated by the Australian Drug Evaluation Committee, and that the drug was of experimental use. According to the author, Depo-Medrol injected Intrathecally is a known cause of Arachnoiditis, a disease that inflames the arachnoid lining (one of the three coverings that envelops the brain and the spinal cord).

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

** Pursuant to rule 84, paragraph 1 (a) of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the consideration of this case.

2.3 Because of serious pain in back, head and arms, the author had a myelogram carried out in October 1979. He was diagnosed as suffering from chronic Arachnoiditis. From November 1980, he received full disability pension. The doctors continued to treat the author with spinal injections of Depo-Medrol up to May 1989, when on returning home from the hospital, the author's right leg collapsed and caused him to fall and break his right foot.

2.4 On 19 November 1990, the author wrote to his treating pain specialist, asking him whether he had used Depo-Medrol and how many injections he had received during the treatment period from 1977 to 1989. When the doctor did not reply to the letter, the author phoned the doctor's office on 19 November 1991, and was advised that his medical records had been moved, and that the doctor had died three months earlier. The author then wrote to the doctor's wife, as executor of his estate, to the three hospitals where the doctor had treated the author, but received no reply from either. He also contacted the Western Australian Health Minister's Office, and eventually received replies from two of the three hospitals. On 22 September 1992, an expert in spinal medicine examined the author, and concluded that he would attribute 70 per cent of the author's symptoms to the complications of Arachnoiditis following exposure to Depo-Medrol.

2.5 On 27 June 1991, the author contacted the law firm Cashman & Partners, which was looking into starting a "Class Action" with 122 plaintiffs having received spinal injections of Depo-Medrol, against the Pharmacia & Upjohn Company. Proceedings were initiated in 1993, the author's case being one out of six lead cases.[3]

2.6 In the author's petition to the Supreme Court of New South Wales, the author, together with four other plaintiffs, claimed that the case should be transferred to the Court of Appeal pursuant to SCR Part 12 rule 2.[4] On 29 February 1996, the Court dismissed the case with costs.

2.7 In the Supreme Court of New South Wales' judgement of 22 December 1998, the author and three other plaintiffs' claim for transfer of their claim to the Court of Appeal was again dismissed, and their claim of transfer to their respective regional courts, was postponed.[5]

2.8 In the year 2000, the High Court of Australia interpreted the Limitation Act applicable throughout Australia, in a way that returned the author's claim back to the jurisdiction of the Supreme Court of Western Australia. According to the author, the High Court ruling implies that his case when returned to the Western Australia Supreme Court, will be statute-barred. Had the author's claim passed before the Supreme Court of New South Wales, his claim would not have been statute-barred, since in this, and several other Australian states, an applicant is granted a six years' extension to file a claim once he becomes aware that injury has been caused by medical neglect or malpractice.

2.9 In a fax dated 23 February 2001, Cashman & Partners notified the author that they ceased to act as solicitor for him. However, in a letter from the Supreme Court of South Wales, dated 14 March 2001, the Court advised the author that the proceedings were adjourned to 20 July 2001, and that the matter would proceed on that date despite the absence of the author or his legal representative. Due to the author being unable to obtain legal aid and to travel, a barrister advised him that his claim would be lost on "technicality", and therefore that he should cease his case.[6] The author later discovered that the Court on 26 October 2000 had ordered the author to pay two of the defendants' costs from 7 July 2000.

The complaint

3.1 The author claims that since his claim against the Pharmacia & Upjohn Company is statute-barred in Western Australia, whereas a similar claim in New South Wales would not be statute-barred, he is being discriminated against, in violation of article 26 of the Covenant. The author submits that the State party's discriminatory practice continued after the Optional Protocol entered into force for Australia.

3.2 The author claims that he was submitted to medical experimentation without giving his consent, in violation of article 7 of the Covenant.

3.3 The author claims that by transferring his claim from a state where it was not statute-barred to a state where it was statute-barred, the Australian courts have violated his rights to equal access to the courts under article 14, paragraph 1, of the Covenant. Furthermore, the doctors' and hospitals' delay in submitting his medical records, caused him to fail to comply with the Limitation Act, and consequently deny him his rights under article 14 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 With regard to the author's claim under article 26 of the Covenant, that the State party's legislation which bars the author's claim against the Pharmacia & Upjohn Company in Western Australia, whereas a similar claim in New South Wales would not be statute-barred, the Committee finds that the author has not substantiated for the purposes of admissibility, that differences in the statute of limitations in different parts of a federal state would as such raise an issue under article 26.

4.3 With regard to the author's claim that he was subjected to medical experimentation without giving his consent in violation of article 7 of the Covenant, the Committee notes that the alleged medical experimentation took place in the period from 1977 to 1989, which is prior to the entry into force of the Optional Protocol for Australia. This claim which relates to the actual treatment administered before September 1991 is therefore inadmissible ratione temporis.

4.4 With regard to the author's claim that by transferring his claim from a state where it was not statute-barred to a state where it was statute-barred, the Australian courts have violated his rights under article 14, paragraph 1, of the Covenant, the Committee finds that the author has not substantiated for purposes of admissibility that he would have had a right under article 14, paragraph 1, to pursue his claims in the courts of New South Wales or that the High Court ruling that the case fell under the jurisdiction of the courts of Western Australia would raise an issue under article 14 of the Covenant. The Committee also finds that the author has not substantiated for the purposes of admissibility that his claim that the doctors' and hospitals' delay in submitting his medical records would raise an issue under article 14, paragraph 1, of the Covenant.

5. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author, and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

[1] The Optional Protocol entered into force for Australia on 24 September 1991.

[2] This is confirmed in a letter to the Hon. Judi Moylan MP, Member for Pearce, from the Ministry for Health and Ageing, dated 29 April 2002. The letter includes a reference to a letter from the author.

[3] The only information submitted on the proceedings are the two judgements described below.

[4] There are no explanations as to the name and the contents of the law.

[5] The author's claim for damages was directed at the Pharmacia & Upjohn Company, the three hospitals where he was given the injections of Depo-Medrol, and five doctors who were involved in the administration of the injections.

[6] There is no information on whether the author followed the barrister's advice.

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